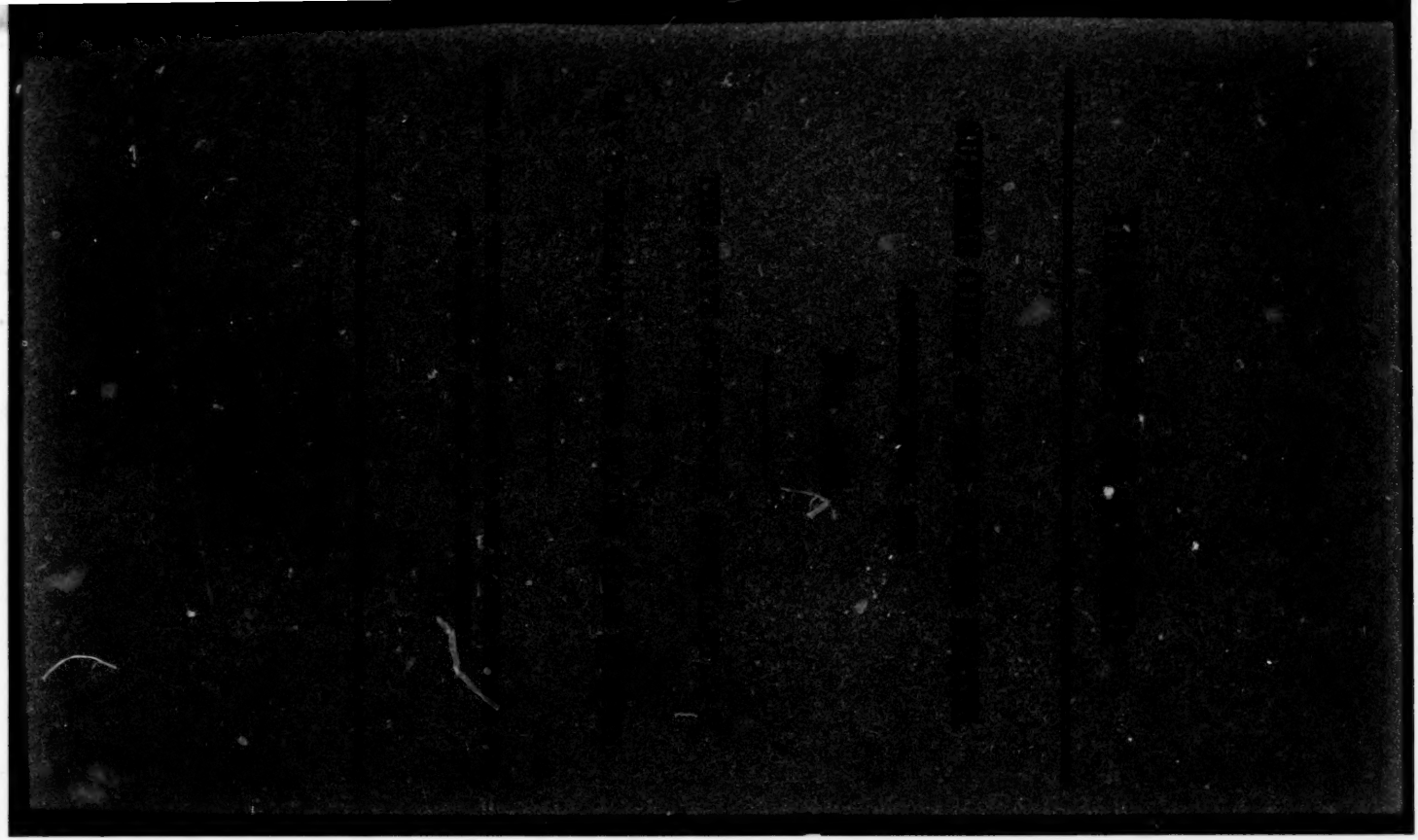


(27,364)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 609.

THE STATE OF MISSOURI, APPELLANT,

vs.

RAY P. HOLLAND, UNITED STATES GAME WARDEN.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

INDEX.

	Original.	Print.
Citation	*a*	1
Caption	1	1
Amended bill of complaint	2	2
Motion to dismiss amended bill of complaint	10	5
Memorandum on motion to dismiss	13	7
Final decree	28	14
Petition for appeal	30	14
Assignment of errors	32	15
Order allowing appeal	34	16
Bond on appeal	36	17
Præcipe for transcript	38	18
Certificate of clerk	39	18

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 21, 1919.

a UNITED STATES OF AMERICA, *sct:*

To Ray P. Holland, United States Game Warden, Appellee:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States of America to be holden at Washington, thirty (30) days from and after the day this citation bears date, pursuant to an appeal filed in the Clerk's office, *for* the District Court of the United States for the Western Division of the Western District of Missouri, wherein the State of Missouri is appellant, and you are appellee, to show cause, if any there be, why the judgment and decree rendered against the said appellant, as in said appeal mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness the Honorable Arba S. Van Valkenburgh, Judge of the District Court of the United States for the Western Division of the Western District of Missouri, this 15th day of October, in the year of our Lord, One Thousand Nine Hundred Nineteen.

ARBA S. VAN VALKENBURGH,
District Judge.

UNITED STATES OF AMERICA,
Western Division of the
Western District of Missouri, sct:

We hereby acknowledge due service of the within citation this 15 day of October, A. D. 1919.

FRANCIS M. WILSON,
United States District Attorney
and Solicitor for Appellee.

b To Ray P. Holland, United States Game Warden.

Citation.

Filed Oct. 15, 1919. Edwin R. Durham, Clerk, by C. J. Murray, Deputy.

1 UNITED STATES OF AMERICA, *sct:*

Be it remembered, that heretofore, at the regular November Term of the United States District Court for the Western Division of the Western District of Missouri, and on the 27th day of March, 1919, a Bill of Complaint was filed in the office of the Clerk of the United States District Court for the Western Division of the Western District of Missouri, wherein State of Missouri, is plaintiff and Ray P. Holland, United States Game Warden, is defendant, In Equity No. 203.

And afterwards, to-wit, on the 21st day of April, 1919, an Order allowing the filing of an Amended Bill was filed and entered of record.

And afterwards, to-wit, on the 21st day of April, 1919, an Amended Bill of Complaint was filed.

Said Amended Bill of Complaint is in words and figures as follows, to-wit:

2 In the District Court of the United States for the Western Division of the Western District of Missouri.

STATE OF MISSOURI, Complainant,

vs.

RAY P. HOLLAND, United States Game Warden, Defendant.

Amended Bill of Complaint.

Comes now complainant, by Frank W. McAllister, its Attorney-General, and, with leave of Court, files its amended complaint herewith as follows:

Complainant states that it is one of the states of the United States of America, and by Act of Congress approved March 6, 1820, was admitted as one of the states, with equal sovereignty and power, and upon an equal footing with the original states; that in its sovereign capacity as a state and as the representative of all the people of the state it holds the title to and has the absolute right and power to control and regulate the taking, killing and use of wild game found within its borders for the benefit of all the people of the state, to whom in their united, or sovereign, capacity the same belongs;

3 that among the said wild game within the borders of the complainant, are anatidæ or water-fowls, including large numbers of wild geese, brant, ducks, snipe, plover, etc., and that in the exercise of its sovereign power and for the preservation of the wild game of the state for the benefit of the people of the state, it has enacted Article II of Chapter 49, Revised Statutes of Missouri, 1909, and an act for the preservation of fish and game, approved March 24, 1915, Laws of Missouri, 1915, pages 289 to 296, inclusive, under the provisions of which the taking of wild game, including the aforesaid water-fowls, is prohibited, except by persons who have been granted permission or license for such purpose, and under the provisions of which the taking of said wild game is prohibited during certain seasons of the year; that under the provisions aforesaid the taking, killing and using of the aforesaid water-fowls is permitted and is lawful between the 15th day of September of each year and the 30th day of April of the following year.

Complainant further states that in the exercise of its aforesaid power to control and regulate the taking and use of the wild game of the state and to protect the same for the proper use of the people

of the state, by the provisions of the aforesaid Article II, Chapter 49 of the Revised Statutes of Missouri, of 1909, and the aforesaid act of the General Assembly for the preservation of fish and game, approved March 24, 1915, Laws of Missouri, 1915, pages 289 to 296, it has established and now maintains a department, with a state game and fish commissioner, at an annual salary of twenty-
4 five hundred dollars, with one or more deputies in each of the sixteen congressional districts of the state, at salaries of three dollars per day, and maintains an office in its state capitol and a clerk and other assistants, for the enforcement of the aforesaid laws, and that the said department and the cost and expenses thereof including the aforesaid salaries, are paid solely from the fees collected for the issuance of licenses for hunting wild game in the state; that the amount so collected for the calendar year Nineteen Hundred and Eighteen was approximately seventy-five thousand dollars, and that said amount, or more, will be collected in future years, but that the acts of defendant and his deputies hereinafter complained of, if continued, will so deter citizens of the state from exercising the right to take wild game under the licenses therefor issued under the laws of the state that the payment of license fees will be greatly diminished and complainant will, by the acts of defendant and his deputies, suffer the loss of a large amount of said license fees and be deprived of a large amount of revenue which it now receives, which loss will amount to not less than twenty-five thousand dollars annually.

Complainant further states that the value of the wild game within its borders, and especially the aforesaid wild geese, brant, ducks, snipe, plover, etc., exceeds the sum of three thousand dollars.

Complainant states that defendant Ray P. Holland is the United States game warden for a district in which is included the
5 State of Missouri, and of which it is a part; that acting under an unconstitutional Act of Congress, known as the "Migratory Bird Treaty Act," U. S. Compiled Statutes of 1918, p. 1795, approved July 3, 1918, and under unconstitutional, unlawful and invalid regulations and orders of the Secretary of Agriculture of the United States, attempting to regulate and control the taking, killing and use of wild game in the State of Missouri and other states of the United States, and attempting to prohibit the citizens of the State of Missouri and all other persons from taking, killing or using the aforesaid water-fowls in the State of Missouri during the months of January, February, March and April of any year, said defendant and his deputies have arrested and are causing to be prosecuted in the Courts of the United States numerous citizens of the State of Missouri, and are threatening to arrest and cause to be prosecuted other citizens of the State of Missouri, and will, unless restrained by this Honorable Court, continue to arrest and cause to be prosecuted, and threaten to arrest and cause to be prosecuted citizens of this state, for taking, and killing the aforesaid water-fowls in this state during the aforesaid season in which complainant has provided that the same may be lawfully killed and taken; that such arrests, prosecutions and threats by the defendant, and his said deputies,

are an invasion of the aforesaid sovereign right and power of the complainant to control and regulate the taking, killing and use of wild game within its borders, and is the usurpation of the sovereign right and power reserved to it, and the other states of the
6 United States, under Article X of the Amendments to the Constitution of the United States, and is an unlawful and illegal interference with and attempt to annul the laws of the state enacted by it under its reserved powers.

Complainant states that the aforesaid Act of Congress and the aforesaid regulations and orders of the Secretary of Agriculture of the United States attempt to control the taking, killing and use of wild game animals in this state, especially the aforesaid water-fowl, and are in direct violation of the aforesaid Article X of the Amendments to the Constitution of the United States, and are unconstitutional, illegal and void.

Complainant states that the injury of which it herein complains is suffered in its sovereign or governmental capacity, is irreparable and that it has no adequate remedy at law.

Wherefore, complainant prays that defendant and his deputies be immediately restrained, and, upon final hearing herein, permanently enjoined from arresting or prosecuting, or from attempting to arrest and prosecute any person for taking, killing or using wild game, especially the aforesaid water-fowls, to-wit: wild geese, brant, duck, snipe and plover, within the borders of the State of Missouri, and from in any wise enforcing or attempting to enforce the aforesaid Act of Congress known as the "Migratory Bird Treaty Act," or any regulations or orders of the Secretary of Agriculture of the United States made, or pretended to be made thereunder, and from in
7 any wise interfering with the lawful exercise of the right and privileges granted by this complainant to its citizens in the exercise of its sovereign and reserved power, and for such other and further orders, judgments and decrees as to the Court may seem proper in the premises, and for all general relief.

FRANK W. McALLISTER,
Attorney General of Missouri,
Solicitor for Complainant.

JOHN T. GOSE,
Assistant Attorney-General of Missouri.
J. G. L. HARVEY,
Of Counsel.

8 STATE OF MISSOURI,
County of Jackson, ss:

Frank W. McAllister, being first duly sworn on his oath, states that he has read and subscribed the foregoing amended complaint, and that the allegations therein set forth are true to the best of his information and belief.

FRANK W. McALLISTER.

Subscribed and sworn to before me this 21st day of April, 1919.
[SEAL.] EDWIN R. DURHAM,
Clerk.

By C. J. MURRAY,
D. C.

Filed April 21, 1919. Edwin R. Durham, Clerk U. S. Dist. Court.

9 And afterwards, to-wit, on the 21st day of April, 1919, a Motion to Dismiss Amended Bill of Complaint was filed. Said Motion to Dismiss Amended Bill of Complaint is in words and figures as follows, to-wit:

10 In the District Court of the United States for the Western Division of the Western District of Missouri.

STATE OF MISSOURI, Complainant,

vs.

RAY P. HOLLAND, United States Game Warden, Defendant.

Motion to Dismiss Amended Bill of Complaint.

Comes now the defendant Ray P. Holland, United States Game Warden, by his attorney, Francis M. Wilson, United States Attorney, in and for the Western District of Missouri, and moves the Court to dismiss complainant's Bill of Complaint for the following reasons, to-wit:

First. Because said Bill of Complaint does not state facts sufficient to entitle complainant to the equitable relief sought, or to any equitable relief whatsoever.

Second. Because upon the face of said Bill of Complaint complainant is not entitled to an injunction, or any other equitable relief.

Third. Because if the Court refuses to grant complainant the injunction prayed for, it will not suffer irreparable injury, or any injury whatsoever.

Fourth. Because complainant has an adequate remedy at law.

Fifth. Because on the face of said Bill of Complaint, the United States is a party in interest and cannot be sued directly or indirectly, by the State of Missouri, complainant herein, without its consent.

Sixth. Because complainant in said bill does not sue in its sovereign capacity for itself, or for all the people of the State of Missouri, but only for certain of her citizens who have been arrested, or may be

11 Seventh. Because the citizens of the State of Missouri, who have been or may be arrested through the enforcement of said Migratory Bird Treaty Act, can only act for themselves in arrested through the enforcement of the Migratory Bird Treaty Act by the federal officials.

their several individual capacities, and their legal rights, whether constitutional or otherwise, can and will be fully protected by the courts of the United States when presented for adjudication to such courts.

Eighth. Because complainant in its Bill of Complaint, seeks the judgment of this court upon political questions and powers and matters of sovereignty which is beyond the power of this court as a court of equity to give.

Ninth. Because complainant seeks to raise in a court of equity, by means of its bill, the question of the constitutionality of said Migratory Bird Treaty Act, and the validity of the orders and regulations made and issued by the Secretary of Agriculture thereunder, when such questions can be fairly and properly raised and determined in the several prosecutions of its citizens and adequate relief given.

Tenth. Because complainant, by its bill, seeks to enjoin criminal prosecution of its citizens and to refer, to a court of equity, questions that are only properly determinable in a court of law.

Eleventh. Because said Migratory Bird Treaty Act is constitutional, and the treaty for which it was enacted to carry into effect was a proper subject of the treaty making power of the United States, and both said treaty and act to render it effective are paramount over all state constitutions, laws, and rights relating to the same subject.

RAY P. HOLLAND,
United States Game Warden.

By FRANCIS M. WILSON,
United States Attorney in and for the Western District of Missouri.

Filed Apl. 21, 1919. Edwin R. Durham, Clerk U. S. District Court.

12 And afterwards, to-wit, on the 2nd day of July, 1919, a Memorandum on Motion to Dismiss was filed.

Said Memorandum on Motion to Dismiss is in words and figures as follows, to-wit:

13 In the District Court of the United States for the St. Joseph Division of the Western District of Missouri.

UNITED STATES OF AMERICA, Plaintiff,

VS.

GEORGE L. SAMPLES, Defendant.

UNITED STATES OF AMERICA, Plaintiff,

VS.

W. C. DE LAPP, Defendant.

Upon Demurrers to Indictments.

In the District Court of the United States for the Western Division of the Western District of Missouri.

STATE OF MISSOURI, Complainant,

VS.

RAY P. HOLLAND, United States Game Warden, Respondent.

On Motion to Dismiss.

14 Mr. Frank W. McAllister, Attorney General of Missouri, Mr. John T. Gose, Assistant Attorney General, Mr. J. G. L. Harvey, Mr. E. L. Westbrooke and Mr. Samuel W. Moore for defendants and complainant.

Mr. Francis M. Wilson, United States District Attorney for plaintiffs and respondent.

Opinion by Van Valkenburgh, District Judge.

December 8, 1916, a treaty between Great Britain and the United States for the protection of migratory birds was proclaimed by the President; thereafter, to give effect to this convention Congress enacted a law, approved July 3, 1918; (United States Statutes at Large, vol. 40, part 1, p. 755-756-757). This act, among other things, provided that it should be unlawful to hunt, take, capture or kill, attempt to take, capture or kill, etc., at any time or in any manner, any migratory bird included in the terms of said convention between the United States and Great Britain unless and except as permitted by regulations made as therein provided by the Secretary of Agriculture. Thereafter, such regulations were made, and duly proclaimed by the President, wherein the open seasons for hunting such birds in all parts of the United States were defined.

15 Canada by an act of Parliament, approved August 29, 1917, gave full effect to said convention and promulgated regulations thereunder May 11, 1918.

The defendants Samples and De Lapp were indicted upon the charge of having violated said Act of Congress, passed to give effect to the treaty aforesaid, and the regulations made thereunder, it being provided in said act that such violation shall be deemed a misdemeanor, carrying a penalty of fine or imprisonment or both. The defendants have interposed to these indictments demurrers containing several specifications, the gist of which is that the act in question is unconstitutional and void, because the subject-matter thereof is exclusively within the property rights and police powers of the state; because no provision can be found in the Federal Constitution for the protection of migratory birds; and because the convention between the United States and Great Britain exceeds the limitations of the treaty-making powers under the Constitution, and is, therefore, in violation of the Constitution itself.

After the return of these indictments the State of Missouri, through its Attorney General, filed its bill in equity, seeking to restrain the Game Warden of the United States, in this jurisdiction, from arresting or prosecuting, or attempting to arrest
16 and prosecute, any person for taking, killing, or using wild game within the borders of the State of Missouri, and from in anywise enforcing or attempting to enforce the aforesaid Act of Congress known as the Migratory Bird Treaty Act, or any regulations or orders of the Secretary of Agriculture of the United States made or pretended to be made thereunder; and from in anywise interfering with the exercise of the rights and privileges granted by complainant to its citizens in the assumed exercise of its sovereign and reserved power. The respondent, through the United States District Attorney, filed his motion to dismiss this bill. Both demurrers and motion were heard together; the former will be first considered.

The issues tendered by the pleadings present two questions: One, the validity of the law standing by itself as affecting the relative powers of the Federal Government and of the states; the other, the status of the treaty, to give effect to which, the so-called Migratory Bird Treaty Act was passed.

Primarily, the state, both as trustee for the rights of all its people and in the exercise of its police power, has control
17 over the right to reduce animals feræ naturæ to possession.

Manchester vs. Mass., 139 U. S. 240.
The Abby Dodge, 223 U. S. 166-174.
Geer vs. Conn., 161 U. S. 519-522-528.
Ward vs. Race Horse, 163 U. S. 504.
Patsone vs. Penn., 232 U. S. 138.
United States vs. McCullagh, 221 Fed. 288.
United States vs. Shauver, 214 Fed. 154.
Silz vs. Hesterberg, 211 U. S. 31.
Kennedy vs. Becker, 241 U. S. 556.
State vs. Rodman, 58 Minn. 393.
Smith vs. Maryland, 18 Howard 71-75.
Lawton vs. Steele, 152 U. S. 133.
Carey vs. South Dakota, Supreme Court No. 346, May Term, 1919.

And in the absence of treaty there appears to have been no delegation of paramount authority to the Federal Government. Under the foregoing authorities, therefore, as well as on principle, this Act, in the absence of treaty, would be unconstitutional as exceeding the legitimate powers of Congress; and so it has been held in cases substantially identical.

United States vs. Shauver, 214 Fed. 154.
United States vs. McCullagh, 221 Fed. 288.

That this power in the state is subject to any valid exercise of authority under the provisions of the Federal Constitution is clear; and that a valid exercise of the treaty making power may be recognized as such a valid exercise of authority has been foreshadowed by necessary implication or by express reservation in the decisions of the Supreme Court of the United States.

18 Ware vs. Hylton, 3 Dall. 199.
Manchester vs. Mass., 139 U. S. 240.
The Abby Dodge vs. United States, 223 U. S. 166-174.
Geer vs. Conn., 161 U. S. 519-522-528.
Ward vs. Race Horse, 163 U. S. 504.
Truax vs. Riach, 239 U. S. 33.
Kennedy vs. Becker, 241 U. S. 556.
Smith vs. Maryland, 18 Howard 71-75.
United States vs. 43 Gallons of Whisky, 93 U. S. 188-197.
Carey vs. South Dakota, Supreme Court, No. 346, May Term, 1919.

See, also, opinion of Attorney General Griggs, 22 Opinions of Attorneys General, 214.

That the power to make treaties is a substantial power of highest degree, delegated by the states to the Federal Government by the terms of the Constitution, is beyond controversy. The treaty making power has been surrendered by the states and given to the United States.

Baldwin vs. Franks, 120 U. S. 678-782.
Fong Yue Ting vs. United States, 149 U. S. 711.
Chinese Exclusion Cases, 130 U. S. 581.

And this extends to state Constitutions and laws as well as to the reserved powers.

Ware vs. Hylton, 3 Dall. 199.
Hoke vs. United States, 227 U. S. 321-322.

Mr. John C. Calhoun, foremost among those insisting upon the fullest sovereign powers of the states, while Secretary of State, made this statement in an official document:

"The treaty making power has indeed been regarded to be so comprehensive as to embrace, with few exceptions, all questions that

can possibly arise between us and other nations and which
19 can only be adjusted by their mutual consent, whether the subject-matter be comprised among the delegated or the reserved powers."

Crandall on Treaties, 2 Ed. par. 105, p. 247.

Where, then, any power has been granted to the Federal Government by the Constitution, to be exercised through legislation by Congress, or as an incident of the legitimate treaty making power, it is superior to State Constitutions and State Laws, and to all other powers, including police powers, ordinarily belonging to the states. All such must be modified, curtailed or, in a proper case, suspended, to insure the full and complete exercise of that superior power which has been delegated by the Constitution to the central government.

"While under our Constitution and form of government the great mass of local matters is controlled by local authorities, the United States in their relation to foreign countries and their subjects or citizens are one nation, invested with powers which belong to independent nations, the exercise of which can be invoked for the maintenance of its absolute independence and security throughout its entire territory."

Chinese Exclusion Case, 130 U. S. 581.

It must be remembered that we are here considering the power of the Federal Government in its relation to the several states. In such case, it is necessary only that the grant of power to the former and its legitimate exercise shall be established. Thereupon, all elements of state sovereignty, however reserved, become at once subor-
20 dinate. No other construction is possible if the Constitution is to be vindicated as the supreme law of the land. Undoubtedly, we may conceive of many rights of the states over which the Federal Government through its power to make treaties can have no control. A number of such are stated in Pierce vs. The State, 13 N. H. 576. The subject-matter of negotiation must be one which falls naturally and logically into recognized classification. It must not be arbitrary, disconnected, and remote from international intercourse.

The validity of this act then depends upon whether this treaty was a valid exercise of federal authority as delegated by the Constitution. A treaty is a compact between two or more independent nations with a view to the public welfare. It is a compact made between two or more nations, entered into for the common advancement of their interests and the interests of civilization.

Michie's Ency. of U. S. Sup. Ct. Rep., vol. 11, p. 636.
Altman & Co. vs. United States, 224 U. S. 583.
14 Diamond Rings vs. United States, 183 U. S. 176-182.

A treaty is invalid if in violation of or inconsistent with the Constitution.

Butler on Treaties, vol. 2, par. 455, p. 350.
Crandall on Treaties, 2 Ed., p. 268.
Federal Statutes Annotated, vol. 9, p. 28.
Cherokee Tobacco Case, 11 Wall. 620.
21 United States vs. Old Settlers, 148 U. S. 427.
Fong Yue Ting vs. United States, 149 U. S. 698.
Ex parte Dos Santos, Federal Case No. 4,016, 7 Fed. Cases 949.
Geofroy vs. Riggs, 133 U. S. 266.

And this being true, the court, in a proper case where the rights of citizens are involved, may so declare.

Michie's Encyc. of U. S. Sup. Ct. Rep., vol. 11, p. 640.
Head Money Cases, 112 U. S. 580-598.
In re Cooper, 143 U S. 473-501-503.
Jones vs. Meehan, 175 U. S. 132.

The general rule as to limitations upon the treaty making power is most comprehensively stated in Geofroy vs. Riggs, 133 U. S. 266. If this pronouncement, in any view, could properly be regarded as obiter, nevertheless it has been so frequently and approvingly restated that it must now be regarded as the settled rule in the courts of this country.

"The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and of that of the states. It does not extend so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the states, or a cession of any portion of the territory of the latter, without its consent. But with these exceptions, there is no limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country."
Geofroy vs. Riggs, 133 U. S. 266.

As has been frequently stated "an attempt to enumerate these limitations in more specific terms than here used by Mr.
22 Justice Field would be idle." It is sufficiently comprehensive to include all acts by the treaty making power which might seek or tend to impair or destroy the constitutional functions exclusively conferred upon this government and its several departments.

Is the protection of migratory birds then "properly the subjects of negotiation with a foreign countyr"? In the opinion of a former Attorney General the United States is given power to enter into treaty stipulations with Great Britain for the regulation of the fisheries in the waters of the United States and Canada along the international boundary; and such is now the accepted view. This is because "the nature and habits of fishes, the means necessary to their pres-

ervation from extinction, and their protection in spawning time are such as to render it of importance that laws regulating their capture shall be uniform and uniformly enforced over the whole extent of the body of water which they inhabit. Where a lake or river is divided into two jurisdictions by a boundary line between two nations, it is manifest that it would be not only convenient but almost necessary for the adequate regulation of the subject *than* an agreement by treaty or other stipulation should exist between the governments of the two countries, in order to make any system of
23 regulation and protection effective." Otherwise, "it is impossible of regulation by uniform and reciprocal rules." Mutuality and the attainment of reciprocal benefits are distinctive features of international conventions. Of course, such must be tangible and proximate. The subject-matter must be of the nature of those that have usually been made the subjects of negotiation and treaty in the ordinary intercourse of nations, provided, always, that they are consistent with the nature of our institutions. It is, of course, unnecessary that the precise subject shall have been previously under consideration. This would mean that nations have exhausted the subject-matter of their intercourse and can no longer extend their avenues of mutual advantage. But, as above stated, the matter of negotiation must be one which falls naturally and logically into recognized classification. It must not be arbitrary, disconnected, and remote from international intercourse.

The case of free-swimming fishes in international waters is one which appeals more readily to the common understanding, because their international contact is apparent. But does the case of migratory birds differ in principle from that of migratory
24 fishes or other similar forms of wild life? The term "migrate" as used in this connection is thus defined:

"To pass periodically from one region or climate to another for feeding or breeding. * * * The majority of birds of the north temperate and arctic regions perform regular migrations, which are dependent on food supply more than on temperature, moving north in the spring and south in the fall."

Seals go regularly to their breeding and feeding grounds. Fishes migrate during the spawning season. Migratory birds nest in the north and feed in the south with the regularity of the seasons. The movements of all these forms of life may be computed almost with mathematical precision. Their courses through the water and through the air are almost as well defined as though marked by Old Trails' monuments. Their movements are dictated by neither whim nor caprice, but are impelled by an instinct which inheres in the law of their being. If this be true, what distinction can we draw between the fish which swims through one of the great natural elements and the bird which flies through another? The controlling consideration is the effect upon the mutual interests of the two nations concerned. By this treaty the United States profits by the protection which is accorded such wild fowl in Canada during the nesting and feeding seasons before the migration sets in to

the south. Canada gains by the same protection which is thrown about the same birds during their stay within the United
25 States. The people of both countries, of our entire union and of all the states, benefit by the mutual and reciprocal advantages which accrue from this arrangement. If this be so, then the subject-matter comes properly within the treaty making power. If it curtails any right which would otherwise be lodged in an individual state, it does so only through the full and untrammeled exercise of a federal power to negotiate with a foreign government. The conflict of jurisdiction, if one can be said to exist, differs in no respect from that which is experienced in the exercise of any power concededly lodged in the Federal government which comes in contact with the ordinary powers of the state over the same subject-matter.

From the foregoing, it follows necessarily that the demurrers to the indictments must be overruled.

With respect to the bill filed on behalf of the State of Missouri but little remains to be said. It is based upon the same misconception as to the constitutionality of this statute that lies at the foundation of the demurrers. The District Attorney insists that the bill should be dismissed for want of jurisdiction. It is true that the United States cannot be sued without its consent, and that, in general, courts of equity are without jurisdiction to restrain crim-
26 inal proceedings. It would seem, however, that a United States Officer, as well as a state officer, under certain circumstances may be restrained from instituting criminal proceedings under an unconstitutional law in accordance with exceptions to the general rule as pointed out in decisions of the Supreme Court. However, it is unnecessary to enter upon any extended discussion of this question. In my view, the law is constitutional, and the United States Game Warden has acted, and is about to act, under lawful authority in the discharge of his official duties. From such acts he cannot, and should not, be restrained by this court. In as much as the bill of complainant is founded solely upon the unconstitutionality of the law and the alleged invasion of a sovereign prerogative of the state, it follows that the relief prayed must be denied and that the bill must be dismissed. It is so ordered.

Kansas City, Missouri, July 2, 1919.

Filed July 2, 1919. Edwin R. Durham, Clerk, by C. J. Murray, D. C.

27 And afterwards, to-wit, on the 15th day of October, 1919, a Final Decree was filed and entered of record.

Said Final Decree is in words and figures as follows, to-wit:

28 In the United States District Court for the Western Division of the Western District of Missouri.

No. 203.

STATE OF MISSOURI, Complainant,

vs.

RAY P. HOLLAND, United States Game Warden, Defendant.

Final Decree.

This cause having heretofore been submitted to the Court on the motion of defendant to dismiss the amended bill of complaint, and the Court having heard the arguments of counsel, and being fully advised in the premises, doth sustain said motion for want of equity in the amended bill, and it is by the Court ordered, adjudged and decreed that the amended bill of complaint be, and the same is hereby dismissed, and that the defendant have and recover of and from the complainant his costs herein expended.

Dated this 15th day of October, 1919.

ARBA S. VAN VALKENBURGH,
Judge.

Filed October 15, 1919. Edwin R. Durham, Clerk, by C. J. Murray, D. C.

29 And afterwards to-wit, on the 15th day of October, 1919, a Petition for Appeal was filed.

Said Petition for Appeal is in words and figures as follows, to-wit:

30 In the District Court of the United States for the Western Division of the Western District of Missouri.

STATE OF MISSOURI, Complainant,

vs.

RAY P. HOLLAND, United States Game Warden, Defendant.

Petition for Appeal.

Now comes the complainant, the State of Missouri, by Frank W. McAllister, its Attorney General, and conceiving itself aggrieved by the decree and judgment rendered and entered in the above entitled cause on the 15th day of October, 1919, does hereby appeal from said judment and decree to the Supreme Court of the United States of America, for the reasons specified in the assignment of errors filed herewith, and prays that its appeal may be allowed, and that citation be issued, as provided by law, and that a transcript of the

record, proceedings, documents and papers upon which said decree was based, duly authenticated, be sent to the Supreme Court of the United States of America, under the rules of such Court in such cases made and provided.

FRANK W. McALLISTER,
Attorney General and Solicitor for Complaintant.

JOHN T. GOSE,
Assistant Attorney General.
J. G. L. HARVEY,
Of Counsel.

Filed Oct. 15, 1919. Edwin R. Durham, Clerk, by C. J. Murray, D. C.

31 And afterwards, to-wit, on the 15th day of October, 1919, an Assignment of Errors was filed.

Said Assignment of Errors is in words and figures as follows, to-wit:

32 In the District Court of the United States for the Western Division of the Western District of Missouri.

STATE OF MISSOURI, Complainant,

vs.

RAY P. HOLLAND, United States Game Warden, Defendant.

Assignment of Errors.

Now comes the complainant in the above entitled cause, the State of Missouri, and makes the following assignment of errors, upon which it will rely in its appeal in the above entitled cause from the decree and judgment rendered in said Court and cause on the 15th day of October, 1919.

1. That the said Court erred in holding that there was a cause of equity in the bill of complaint, and in dismissing such bill of complaint.

2. The Court erred in holding the statute of the United States described as the "Migratory Bird Treaty Act", approved July 3, 1918, constitutional.

3. The Court erred in holding that the convention between the United States and Great Britain, proclaimed to be effective December 8, 1916, pursuant to which said "Migratory Bird Treaty Act" was enacted, did not invade powers and property rights reserved to the State of Missouri by the Constitution of the United States.

Wherefore, the complainant prays that the action of the said District Court in dismissing said bill be reversed.

FRANK W. McALLISTER,
Attorney General and Solicitor for Complainant.

JOHN T. GOSE,
Assistant Attorney General.
J. G. L. HARVEY,
Of Counsel.

Filed Oct. 15, 1919. Edwin R. Durham, Clerk, By C. J. Murray, D. C.

33 And afterwards, to-wit, on the 15th day of October, 1919, an Order Allowing Appeal was filed and entered of record. Said Order Allowing Appeal is in words and figures as follows, to-wit:

34 In the District Court of the United States for the Western Division of the Western District of Missouri.

STATE OF MISSOURI, Complainant,

vs.

RAY P. HOLLAND, United States Game Warden, Defendant.

Order.

On motion of Frank W. McAllister, Attorney General, and solicitor for complainant, the State of Missouri, and it appearing to the Court that this cause involves the construction and application of the Constitution of the United States and the constitutionality of a law of the United States, and that the validity and construction of a treaty made under its authority is drawn in question, it is hereby ordered that an appeal to the Supreme Court of the United States of America from the judgment and decree heretofore and on the 15th day of October, 1919, rendered and entered herein, be and the same is hereby allowed, and that a certified transcript of the record, motions, stipulations and all proceedings be forthwith transmitted to the Supreme Court of the United States of America.

Dated this 15th day of October, 1919.

ARBA S. VAN VALKENBURGH,
Judge.

Filed Oct. 15, 1919. Edwin R. Durham, Clerk, By C. J. Murray, D. C.

35 And afterwards, to-wit, on the 15th day of October, 1919, a Bond on Appeal, was filed. Said Bond on Appeal is in words and figures as follows, to-wit:

36 In the United States District Court for the Western Division of the Western District of Missouri.

No. 203.

STATE OF MISSOURI, Complainant,

vs.

RAY P. HOLLAND, United States Game Warden, Defendant.

Know all men by these presents, That we, the State of Missouri, as principal, and J. T. Gose and J. G. L. Harvey, as securities, are held and firmly bound unto Ray P. Holland, United States Game Warden in the full and just sum of Two Hundred Fifty ($250.00) Dollars, to be paid to the said Holland, his heirs, executors, administrators, successors or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, successors or assigns, jointly and severally by these presents. Sealed with our seals and dated this 15th day of October, in the year of our Lord One Thousand Nine Hundred and Nineteen.

Whereas, lately at the April term of the United States District Court for the Western Division of the Western District of Missouri, in a suit depending in said Court between the State of Missouri, as complainant, and Ray P. Holland, United States Game Warden, defendant, judgment was rendered against the said complainant, and said complainant has obtained an appeal of the said Court to reverse the judgment and decree in the aforesaid suit, and a citation directed to the said defendant, citing and admonishing him to be and appear in the Supreme Court of the United States of America to be holden at Washington, District of Columbia, thirty (30) days from and after the date of said citation,

Now, the condition of the above obligation is such that if the said State of Missouri shall prosecute said appeal to effect and answer all damages and costs if it fail to make good its plea, then the above obligation to be void; else, to remain in full force and virtue.

Sealed and delivered in presence of—

STATE OF MISSOURI,
By FRANK W. McALLISTER, [SEAL.]
Attorney General.
J. T. GOSE. [SEAL.]
J. G. L. HARVEY. [SEAL.]

Approved Oct. 15, '19.
ARBA S. VAN VALKENBURGH,
District Judge.

Filed Oct. 15, 1919. Edwin R. Durham, Clerk, by C. J. Murray, D. C.

37 And afterwards, to-wit, on the 15th day of October, 1919, a Præcipe for Transcript was filed.

Said Præcipe for Transcript is in words and figures as follows, to-wit:

38 In the District Court of the United States for the Western Division of the Western District of Missouri.

STATE OF MISSOURI, Complainant,

vs.

RAY P. HOLLAND, United States Game Warden, Defendant.

Præcipe.

To the Clerk of the United States District Court for the Western Division of the Western District of Missouri:

Please incorporate in the transcript of proceedings to be forwarded to the Supreme Court of the United States of America in the above entitled cause, the following:

1. Amended Bill of Complaint.
2. The Motion to Dismiss Amended Bill of Complaint.
3. The Final Decree and Judgment.
4. The Memorandum Opinion on Final Hearing.
5. Petition for Appeal.
6. Assignment of Errors.
7. Order Allowing Appeal.
8. Bond on Appeal.

FRANK W. McALLISTER,
Attorney General and Solicitor for Complainant.

JOHN T. GOSE,
Assistant Attorney General.
J. G. L. HARVEY,
Of Counsel.

Filed Oct. 15, 1919. Edwin R. Durham, Clerk, by C. J. Murray, D. C.

39 UNITED STATES OF AMERICA, *sct:*

I, Edwin R. Durham, Clerk of the District Court of the United States for the Western Division of the Western District of Missouri, do hereby certify that the above and foregoing is a full, true and

complete copy of the record, Assignment of Errors, and all proceedings in the cause wherein, State of Missouri, is plaintiff and Ray P. Holland, United States Game Warden, is defendant, In Equity, No. 203, as fully as the same appear on file and of record in my office, in compliance with Præcipe filed herein and made a part hereof.

I further certify that the original Citation is prefixed hereto and returned herewith.

Witness my hand as Clerk and the seal of said Court. Done at office in Kansas City, Missouri, this 3rd day of November A. D. 1919.

[Seal of the United States District Court, Western Division, Western District of Missouri.]

EDWIN R. DURHAM,
Clerk U. S. District Court,
By C. J. MURRAY, *D. C.*

Endorsed on cover: Filed No. 27,364. W. Missouri D. C. U. S. Term No. 609. The State of Missouri, appellant, vs. Ray P. Holland, United States Game Warden. Filed November 20th, 1919. File No. 27,364.

Office Supreme Court, U. S.
FILED
DEC 5 1919
JAMES D. MAHER,
CLERK.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1919.

No. 609

STATE OF MISSOURI, Appellant,
vs.
RAY P. HOLLAND, United States Game Warden,
Appellee.

MOTION TO ADVANCE.

FRANK W. McALLISTER,
Attorney-General of Missouri,

JOHN T. GOSE,
Assistant Attorney-General,
Solicitors for Appellant.

J. G. L. HARVEY,
Of Counsel for Appellant.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1919.

No. 609

STATE OF MISSOURI, Appellant,

vs.

RAY P. HOLLAND, United States Game Warden, Appellee.

MOTION TO ADVANCE.

The appellant, State of Missouri, moves the court to advance this cause on the docket and hear the same at its early convenience during the present term of the court.

THE MATTER INVOLVED.

The appellant, State of Missouri, filed its bill of complaint in the United States District Court for the Western Division of the Western District of Missouri, on the 28th day of March, 1919, alleging that the Act of Congress, approved July 3, 1918, U. S. Compiled Statutes of 1918, p. 1795 et seq., known as the "Migratory Bird Treaty Act," infringes upon the reserved, or police, power of appellant under the tenth amendment to the Constitution of the United States and is illegal and void, in that it infringes upon the sovereign right of appellant to control and regulate the taking, killing and use of wild game within its borders, and praying that appellee be immediately restrained, and, upon final hearing, permanently enjoined, from arresting citizens of appellant, or from in any wise attempting to enforce the provisions of the aforesaid act of Congress. The District Court denied a temporary restraining order and entered judgment dismissing appellant's bill for want of equity on the 15th day of October, 1919, holding that the act of Congress in question was constitutional and valid and not an infringement of the sovereign right of appellant, and the cause involving the construction and application of the Constitution of the United States and the constitutionality of a law of the United States and the validity and construction of a treaty made under the authority of the United States being drawn in question, appellant prosecutes its appeal from said judgment to this Court.

Briefly summarized, the amended complaint alleges the following:

1. That complainant is one of the states of the United States, and that, in its sovereign capacity and as the representative of the people of the state, it holds the title to and has the power to control and regulate the taking, killing and use of wild game found within its borders for the benefit of all the people of the state, to whom, in their united or sovereign capacity, the same belongs.

2. That among the wild game within complainant's borders are large numbers of wild waterfowls, including geese, brant, ducks, snipe, plover, etc.

3. That in the exercise of its sovereign power complainant, for the preservation of the wild game for the benefit of the people of the state, has enacted Article II of Chapter 49 of the Revised Statutes of Missouri, 1909, and "An Act for the Preservation of Fish and Game," approved March 24, 1915, Laws of Missouri, 1915, pages 289 to 296, inclusive, under the provisions of which the taking of wild game, including the

aforesaid waterfowls, is prohibited, except by persons who have been granted licenses for such purpose and under the provisions of which the taking of wild game is prohibited during certain seasons of the year, but that the taking of the aforesaid waterfowls is permitted and is lawful between the 15th day of September and the 30th day of April of the following year.

4. That complainant has by legislative enactment established and maintains a department for the enforcement of the aforesaid laws, the cost and expenses of which are paid solely from the fees collected for the issuance of licenses for hunting wild game; that the amount so collected in the calendar year 1918 was approximately seventy-five thousand dollars and that an equal, or larger, amount will be collected in future years, but that the acts of defendant and his deputies thereinafter complained of would deter citizens of complainant and others from the payment of license fees and the amount received would be greatly diminished and complainant will be deprived of a large amount of revenue which it now receives, which loss will amount to not less than twenty-five thousand dollars annually.

5. That defendant, Ray P. Holland, is the United States Game Warden for a district in which is included the State of Missouri and of which it is a part and that, acting under the aforesaid act of Congress known as the "Migratory Bird Treaty Act" and under regulations and orders of the Secretary of Agriculture of the United States made thereunder, attempting to regulate and control the taking, killing and use of wild game in the state of Missouri and other states of the United States and attempting to prohibit the citizens of the state of Missouri and all other persons from taking, killing or using the aforesaid waterfowls in the state of Missouri during the months of January, February, March and April of any year, defendant and his deputies have arrested and are causing to be prosecuted in the courts of the United States numerous citizens of complainant and are threatening to arrest and cause to be prosecuted other citizens of complainant for taking and killing the aforesaid waterfowls during the aforesaid season in which complainant has provided that the same may be lawfully killed and taken.

6. That such arrests, prosecutions and threats by defendant and his deputies are an invasion of the sovereign right and power of complainant to control and regulate the taking, killing and use of wild game within its borders and is the usurpation of the sovereign right and power reserved to complainant and the other states of the United States under Article X of the Amendments to the Constitution of the United

States and is an illegal interference with and attempt to annul the laws of complainant enacted by it under its reserved powers.

7. That the aforesaid act of Congress and the aforesaid regulations and orders of the Secretary of Agriculture of the United States are in direct violation of Article X of the Amendments to the Constitution of the United States and are unconstitutional, illegal and void.

REASONS FOR THE MOTION.

I.

The State of Missouri is the party in interest on one side of the controversy and the case falls within the terms of the act of Congress of June 30, 1870, 16 Stats. at Large, 176 (6 Fed. Stat. Ann. (2nd Ed.), p. 92.)

The provisions of the "Migratory Bird Treaty Act," which is attacked as unconstitutional and invalid, and the provisions of Art. II, Chap. 49 of the Revised Statutes of Missouri, 1909, and of the Act of the General Assembly, approved March 24, 1915, Laws of Missouri, 1915, pp. 288, to 296, inclusive, long in force and recognized as valid, are directly in conflict; both are criminal statutes and penalties of both fine and imprisonment are fixed for violations of each.

The result is conflict between appellee and his deputies in attempting to enforce the provisions of the federal act within the borders of appellant, and appellant's officers, in attempting to enforce the provisions of the state law in the same territory; confusion and annoyance to the citizens of the state, as they may not avail themselves of the provisions and privileges of the state law without violating the provisions of the federal act and the regulations promulgated thereunder; and embarrassment to the state government in the enforcement of the provisions of its own laws, in the loss of revenue it has provided for the support of its fish and game department and for the protection of the wild game within its borders.

The provisions of the two laws cannot be reconciled, and if the one is valid the other must be invalid.

It, therefore, is a question of importance to appellant and to many of its citizens, as it affects the orderly administration of the affairs of the state and the duties and obligations of many of its citizens, to have the validity, or invalidity, if it is invalid, of the federal act speedily determined.

II.

The laws of many of the states of the Union controlling and providing for the taking of wild game within their borders,

long recognized as valid, also conflict with the federal act involved in like manner as the laws of appellant, and the disposition of this case will be determinative of a large number of cases and controversies involving the same subject-matter arising in other states.

It is, therefore, suggested that this case is representative of a numerous class of cases, pending and prospective, involving the same question, in both the federal and state courts in many of the states of the Union and which will be determined under the authority of the decision of the court in this case.

FRANK W. McALLISTER,
Attorney-General of Missouri,
JOHN T. GOSE,
Assistant Attorney-General,
Solicitors for Appellant.

J. G. L. HARVEY,
Of Counsel for Appellant.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 609

STATE OF MISSOURI, Appellant,
vs.
RAY P. HOLLAND, United States Game Warden,
Appellee.

TO HONORABLE FRANCIS M. WILSON,
UNITED STATES ATTORNEY,
SOLICITOR FOR APPELLEE:

Please take notice that appellant will file the accompanying motion to advance the above entitled cause in the Supreme Court of the United States and will present same to the court on the 8th day of December, 1919, or as soon thereafter as counsel may be heard.

This the 29th day of November, 1919.

FRANK W. McALLISTER,
Attorney-General of Missouri,
Solicitor for Appellant.

√

FILED
FEB 6 1920
JAMES D. MAHER,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1919.

No. 609.

THE STATE OF MISSOURI, Appellant,
vs.
RAY P. HOLLAND, United States Game Warden.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

BRIEF OF APPELLANT.

FRANK W. McALLISTER,
Attorney-General of Missouri,

JOHN T. GOSE,
Assistant Attorney-General of Missouri,
Solicitors for Appellant.

J. G. L. HARVEY,
Of Counsel for Appellant.

"I cannot conceive how it can be held that pledges made to an alien people can be treated as more sacred than is that great pledge given by every member of every department of the government of the United States to support and defend the Constitution."

Mr. Justice (now Mr. Chief Justice) White, in Downes v. Bidwell, 182 U. S. 344.

SUBJECT INDEX.

		Page.
Statement		1-16
Summary of the Bill		1-2
Contentions of Appellant		3
District Court's Statement of the Issues Tendered by the Pleading		4
Holdings of the District Court		4
Treaty Between United States and Great Britain		5-8
Migratory Bird Treaty Act		9-13
Missouri Laws		13-15
Proclamation of Regulations under Migratory Bird Treaty Act		15-16
(All Italics in this Brief may be treated as ours)		16
Specifications of Error		17
Argument		18-95
Foreword		18-19
I.	Right to Enjoin Federal Officer	19-21
II.	Federal and State Governments Distinct Sovereignties	22-27
III.	When United Colonies became Free and Independent States, the Power to Control the Taking of Wild Game Passed to the States	27-28
IV.	Missouri, upon admission to the Union, became entitled to and possessed of all Rights, Dominion and Sovereignty of the Original States	28-30
V.	The Ownership of Wild Game is that of the people of the State in their collective sovereign capacity; the State holds the same in trust for the Benefit of all its people	30-32
VI.	The Power of the State over Wild Game is not limited to this Trust for the Benefit of all the People; the Power is inherent in the State by virtue of its Power of Police	32-42
VII.	The Act of Congress, March 4, 1913, which undertook to take from the States their Power over Wild Game, was held unconstitutional	42
VIII.	An Act of Congress which attempts to do not only that which Congress has no Power to do, but also to do that which is forbidden to the entire Federal Government under the Constitution, cannot be validated by a Treaty. Treaties must be made subject to the rightful Powers of the Government concerned	43-59
IX.	The Federal Government is not only a Government of Enumerated Powers, but also a Government to which Certain Powers are denied. Powers denied are not to be implied; can only be obtained by Amendment	59-64

Page.

X. Among the Powers denied to the Federal Government until secured by Amendment are the Powers reserved to the States respectively or to the People. To destroy these reserved Powers is to destroy the State and change the Form of Government devised by the Constitution. The control of Wild Game is within the "reserved" Powers 64-73

XI. A Treaty is not the Supreme Law of the Land; it consists of, first, the Constitution; second, the Laws of the United States made in pursuance thereof; and third, all Treaties made under the Authority of the United States. The general grant of Power to make Treaties must yield to the specific reservation of Rights reserved to the People 73-86

XII. Cases usually cited in support of the Treaty-supremacy Theory do not support that Claim 86-92

XIII. The Treaty-supremacy Theory in its ultimate Analysis means that the Treaty-making Power possesses a *general negative* upon all State Laws passed by the States in the exercise of their reserved Powers. The Treaty-making Department of the Government can possess no such Power if the Constitution be today the same that it was when adopted 92-95

Conclusion 96-97

Upon Principle and the Authority of this Court both the Treaty and State Laws may be held intact, and only a Law of Congress, not necessarily required by the Treaty and which, under the Constitution, Congress had no Power to pass, be held unconstitutional.

Solicitors and Counsel for Appellant 97

CASES CITED.

Page.

Abby Dodge v. United States, 223 U. S. 166 ..... 30, 32
Articles of Confederation, Art. II 22
Barron v. Baltimore, 7 Pet. 243, (32 U. S. 243) 60, 61
Beer Co. v. Massachussets, 97 U. S. 25 ..... 33, 37, 68
Behring Sea Arbitration, 32 Am. Law Reg. 901 41
Broadnax v. Missouri, 219 U. S. 292 33
Butler, Treaty Making Power, Vol. I, p. 64 ..... 43, 44, 49, 74, 82
Constitution of the United States—
Amendments I to X 60
Amendment X 44
Article IX 22, 23
Article X 22, 23
Calhoun, Works of, pp. 252, 249 ..... 43, 46, 47, 93, 95
Cantini v. Tillman, 54 Fed. 969 ..... 33, 43, 48
Cardwell v. Bridge Co., 113 U. S. 205 28
Carey v. S. D., U. S. Sup. Ct. Rep., May Term, 1919 30
Chambers v. Church, 14 R. I. 398 30
Charter of the Forests 28
Cherokee Tobacco Case, 11 Wall. 616, 20 L. Ed. 227 ..... 44, 54, 84
Chirac v. Chirac, 2 Wheat. 259 87
City of New York v. Miln, 11 Pet. 102 ..... 33, 70
Cocke, William Archer, Constitutional History of the United States, p. 235 ..... 44, 52, 74, 80
Collector v. Day, 11 Wall. 113, 20 L. Ed. 122 ..... 22, 24, 27, 64, 71
Commonwealth v. Alger, 7 Cush. 53 ..... 33, 38
Compagnie v. Board, 186 U. S. 380, 51 La. Ann. 645, 25 So. Rep. 591 ..... 33, 43, 48, 69, 74, 81, 96
Congressional Record, 41, Part. 1, p. 299 ..... 43, 52, 74, 79
Cook v. Marshall, 196 U. S. 261 33
Cooley, Constitutional Limitations, (7 Ed.), p. 831 ..... 44, 69, 70
Cooley, The Forum 74, 75
Cooley, Principles of Constitutional Law, p. 117 ..... 43, 50
Cutler v. Dibble, 2 How. 366 33
Davis v. Los Angeles, 189 U. S. 217 19
Declaration of Independence, Last Paragraph 22
Dobbins v. Los Angeles, 195 U. S. 241 19
Downes v. Bidwell, 182 U. S. 244 ..... 64, 65, 96
Duer, Lectures on Constitutional Jurisprudence, of the United States, (2 Ed.), p. 228 ..... 43, 50, 74, 78
Elliott's Debates, Vol. III, pp. 504, 407 ..... 44, 53, 75, 85
Escanaba v. Chicago, 107 U. S. 678 ..... 28, 29, 34
Ex Parte Maier, 103 Cal. 476 30
Ex Parte Young, 209 U. S. 162 19
Fairbank v. United States, 181 U. S. 283 ..... 60, 61
Fairfax v. Hunter, 7 Cranch, 803 88

Page.
Federalist, No. XLV (Hallowell, 1852), pp. 145, 215 . . 33, 43, 45, 46, 64
Fertilizing Co. v. Hyde Park, 97 U. S. 659, 24 L. Ed. 1036 69
Fong Yue Ting, 149 U. S. 698 44
Fox v. United States, 94 U. S. 320 87
Ft. Leavenworth v. Lowe, 114 U. S. 525 44
Geer v. Connecticut, 161 U. S. 519 . . . . . 27, 30, 31, 33, 68
Gentile v. State, 29 Ind. 409 30
Geofroy v. Riggs, 133 U. S. 258 . . . . . 43, 47, 64, 65, 86, 87
George v. Pierce, 148 N. Y. Supp. 230 . . . . . 43, 48, 64
Gibbons v. Ogden, 9 Wheat. 1, 6 L. Ed. 23 39
Glenwood Light & Water Co. v. Power Co., 239 U. S. 121 20
Gordon v. United States, 117 U. S. 697 . . . . . 22, 25
Groves v. Slaughter, 15 Pet. 449 . . . . . 33, 35
Hamilton's Works 44, 74, 75
Hammer v. Dagenhart, 247 U. S. 251 (38 Sup. Ct. Rep. 529) . . 36, 64, 66
Haunenstein v. Lyndham, 100 U. S. 483 89
Head Money Cases, 112 U. S. 580 44
Heim v. McCall, 239 U. S. 175 . . . . . 30, 67, 96
Hoke v. United States, 22 U. S. 322 89
Holden v. Joy, 17 Wall. 243 . . . . . 60, 61
Holmes v. Jennison, 14 Pet. 616, 10 L. Ed. 579 39
House v. Mayes, 219 U. S. 270 . . . . . 33, 41
In re Deininger, 108 Fed. 623 30
In re Rahrer, 140 U. S. 545 . . . . . 33, 34, 40
Jefferson, Manual of Parliamentary Practice, p. 110, note 3 . . 44, 52, 75, 84
Jones v. Meehan, 175 U. S. 132 44
Kansas v. Colorado, 206 U. S. 46 . . . . . 44, 57, 60
Lane County v. Oregon, 7 Wall. 71, 19 L. Ed. 101 . . . . . 22, 25
Lane v. Watts, 234 U. S. 37 19
License Cases, 5 How. 504, 12 L. Ed. 256 . . . . . 39, 69
Loan Association v. Topeka, 20 Wallace, 655 . . . . . 43, 49, 74, 83
Magna Charta 28
Magner v. People, 97 Ill. 320 30
Magruder v. Bell Fourche, 219 Fed. 72, 79 19
Manchester v. Mass., 139 U. S. 240 30
Martin v. Hunter, 1 Wheat. 325 . . . . . 22, 26, 44
Martin v. Waddell, 16 Pet. 410 30
McCready v. Virginia, 94 U. S. 391 . . . . . 30, 31
McCulloch v. Maryland, 4 Wheat. 316, 4 L. d. 579 . . . . . 22, 24
Migratory Bird Treaty, Article VIII 97
Mormon Church v. United States, 136 U. S. 1 44
Moore's Int. Law Dig., Vol. V, p. 168 . . . . . 74, 80
Murphy v. Ramsey, 114 U. S. 15 . . . . . 44, 63
Noble v. Railroad, 147 U. S. 165, 172 19
North Am. Review, Benj. Harrison 74, 82
Northwestern Fertilizing Co. v. Hyde Park, 97 U. S. 659, 24 L. Ed. 1036 69
Opinions of Attorney-Generals 44, 55
Orr v. Hodgson, 4 Wheat. 453 88
Parker v. People, 411 Ill. 581 28
Passenger Cases, 7 How. 466, 12 L. Ed. 779 . . . . . 40, 41, 42

Page.
Patsone v. Pennsylvania, 232 U. S. 138, 58 L. Ed. 544 ..... 30, 32
People v. Becker, 241 U. S. 556 33
People v. Gerke, 5 Cal. 381 ..... 43, 48, 64, 88
People v. Naglee, 1 Cal. 246 ..... 44, 55, 74, 79
Permoli v. Municipality, 44 U. S. 589 28
Phil. Co. v. Stimpson, 223 U. S. 605 19
Pierce v. State, 13 N. H. 536 ..... 33, 35, 37, 44, 64, 70
Plumley v. Massachusetts, 155 U. S. 461 33
Pollard v. Hagan, 3 How. 212 ..... 28, 29
Prigg v. Commonwealth, 16 Pet. 539, 10 L. Ed. 1060 ..... 33, 39
Rupert v. United States, 181 Fed. 87 ..... 30, 33
School Magnetic Healing v. McAnnulty, 187 U. S. 94 19
Seneca Nation v. Christie, 126 N. Y. 122 44
Siemssen v. Bofer, 6 Cal. Rep. 250 ..... 44, 54
Silz v. Hesterberg, 211 U. S. 31 30
Smith v. Alabama, 124 U. S. 476 33
Smith v. Maryland, 18 How. 71, 15 L. Ed. 270 30
South Carolina v. United States, 199 U. S. 447, 50 L. Ed. 261, 26 S. C. 110 ..... 19, 22, 23, 64, 71
State of Georgia v. Copper Co., 206 U. S. 230, 237 20
State of Kansas v. State of Colorado, 185 U. S. 125 20
State of Missouri v. State of Illinois, 180 U. S. 208 ..... 20, 21
State v. Heger, 194 Mo. 707 34
Story, Commentaries on the Constitution, Sec. 1508 ..... 43, 50, 74, 83
Thayer, Cases on Constitutional Law, Vol. I, p. 373 ..... 43, 51
The Federalist, No. XLV (Hallowell, 1852), pp. 145, 215 ..... 33, 43, 45, 46, 64
Thorp v. Rutland, 27 Vt. 140 ..... 33, 38
Thorp, Constitutional History, Vol. II, p. 199 ..... 74, 83
Thurlow v. The Commonwealth (Passenger Cases) 5 How. 504, 12 L. Ed. 256 40
Truax v. Raich, 239 U. S. 33, 37 (36 S. C. R. 7) 19, 67
Tucker on the Constitution, Vol II, p. 726 ..... 43, 48, 51, 63, 64
Tucker, Limitations, Treaty-making Power ..... 26, 64, 71, 72, 74, ... 76, 77, 78, 81, 82, 89
Tucker, address, Georgia Bar Association 89
Turner v. Williams, 194 U. S. 279, 48 L. Ed. 979 ..... 22, 25
United States v. DeWitt, 9 Wall. 41, 19 L. Ed. 593 ..... 37, 41, 66, 90
United States v. Knight, 156 U. S. 13 92
United States v. Lee, 106 U. S. 196 19
United States v. M'Cullagh, 221 Fed. 288 ..... 30, 42, 68
United States v. Rhodes, 1 Abb. U. S. Rep. 43, Federal Cases, 16151 .. 60, 62
United States v. Shauver, 214 Fed. 154 ..... 30, 32, 42, 60, 62
Von Holst, Constitutional Law of the United States, p. 202 .. 43, 51, 74, 77
Ward v. Race Horse, 163 U. S. 504 ..... 27, 28, 29, 67, 84
Ware v. Hylton, 3 Dallas, 199 86
Williamette, Oregon, v. Hatch, 125 U. S. 1 28
Willoughby, Constitution, Vol. I, p. 66 ..... 22, 24
Withers v. Buckley, 61 U. S. 84 28
Works of Calhoun, pp. 252, 249 ..... 43, 46, 47, 93, 95

Supreme Court of the United States.

OCTOBER TERM, 1919.

No. 609.

THE STATE OF MISSOURI, Appellant,
vs.
RAY P. HOLLAND, United States Game Warden.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

BRIEF OF APPELLANT.

STATEMENT.

This suit involves the constitutionality of the "Migratory Bird Treaty Act" and is an endeavor upon the part of the State of Missouri, appellant, to preserve intact its sovereignty and to retain unimpaired the powers reserved to it by the tenth amendment to the Federal Constitution.

The bill (Printed Abstract, pp. 2 to 4, inclusive) alleges the arrest and prosecution of citizens of Missouri and the threatened arrest and prosecution of other citizens by the United States Game Warden, for violations of the Migratory Bird Treaty Act, and seeks, on account of the unconstitutionality of such act, to enjoin such arrests and prosecutions and the enforcement of the act in any wise, upon the following grounds:

(a) That the arrests and prosecutions and threatened arrests and prosecutions by the Game Warden constitute an invasion of the sovereignty of the state of Missouri and a violation of the laws of Missouri upon the subject.

(b) That the enforcement of the Federal act constitutes an interference with the property right of the people, held in trust by the State, to the wild game within its borders.

(c) That the arrest and prosecution of citizens of Missouri for the exercise of lawful privileges conferred by the state prevented the discharge of the duty of the State to protect its citizens in the enjoyment of such privileges.

(d) That the destruction of the revenues of the State derived from hunters' licenses was threatened by the enforcement of the Federal act.

United States Game Warden Holland, by Mr. Francis M. Wilson, United States District Attorney, moved to dismiss for want of equity in the bill, which said motion (Printed Abstract, pp. 5 and 6) was sustained; and thereupon, complainant declining to plead further, judgment and decree dismissing the bill was entered.

The cause involving the construction and application of the Constitution of the United States and the constitutionality of a law of the United States and the validity and construction of a treaty made under the authority of the United States being drawn in question, appellant prosecutes its appeal from said judgment to this Court.

Subsequent to the enactment by Congress of the above Migratory Bird Treaty Act, to-wit: on the 31st day of July, 1918, the President of the United States issued his proclamation approving and proclaiming certain regulations made by the Secretary of Agriculture pursuant to the provisions of said above Migratory Bird Treaty Act. Under said regulations the open season in Missouri for waterfowl (except wood duck, eider ducks, and swans), coot, gallinules, and Wilson snipe and jacksnipe, *is fixed as from September 16th to December 31st.* (Post. page 16.)

The state of Missouri, by virtue of its trust right as sovereign and in the exercise of its reserved powers of police, has, in fact, since at least the year 1874 (Laws of Missouri,

1874, page 108), continuously asserted and exercised the absolute control of wild game within her own borders. Article II of Chapter 49, Revised Statutes of Missouri, 1909, and an act for the preservation of fish and game, approved March 24, 1915, Laws of Missouri, 1915, pages 289 to 296, inclusive, prohibits the taking of wild game, including the aforesaid waterfowls specified in said proclamation of the President of the United States, except by persons who have been granted permission or license for such purpose, and the taking of said wild game is prohibited during certain seasons of the year. Under the provisions aforesaid the taking, killing and using of the aforesaid waterfowls is permitted and *is lawful between the 15th day of September of each year and the 30th day of April of the following year.* (Post. page 13.)

It thus appears that the provisions of the federal law and the provisions of the laws of the state of Missouri, relating to the taking, killing and use of migratory game birds, are in direct conflict.

Appellant contended below, and contends here, that the authority of the state over wild game within its borders is paramount under either of two views:

First.—The *trust right* of the state, which in its sovereign capacity as the representative of and for the use and benefit of all its people in common, holds the title to all wild game within its borders, the ownership of such wild game being that of its people in their united sovereignty.

Second.—The police power of the state.

This contention of the power of the state over wild game within its borders necessarily draws in question the validity and construction of a treaty relating to migratory game birds, made between the United States of America and Great Britain on the 16th day of August, 1916, and proclaimed December 8th, 1916. (Post. page 5.)

It involves also the construction and application of the Constitution of the United States, particularly Article X of the amendments thereto, and the constitutionality of a law of the United States known as the "Migratory Bird Treaty Act," approved July 3rd, 1918, U. S. Compiled Statutes, 1918, page 1795. (Post. page 9.)

This is true because the treaty between the United States of America and Great Britain, and the Migratory Bird Treaty Act of Congress upon their face apparently assume and assert the paramount authority and power of the Federal Government over migratory game birds within the borders of any state of the United States of America; consequently, by necessary implication, they deny to the state of Missouri and to each of the several states of the Union the right of sovereignty and the possession of reserved power, in so far as such sovereignty and reserved power affect the taking, killing and use of wild game within the borders of such states.

The Honorable Arba S. Van Valkenburgh, Judge of the District Court, in his opinion filed in this case, said that the issues tendered by the pleadings present two questions:

(1) the validity of the law (Migratory Bird Treaty Act) standing by itself, as affecting the relative power of the Federal Government and of the states;

(2) the other, the status of the treaty (between the United States of America and Great Britain), to give effect to which the so-called Migratory Bird Treaty Act, was passed. (Printed abstract of record, page 8).

In this opinion the District Court held:

First, that upon authority and principle the Migratory Bird Treaty Act, in the absence of treaty, would be unconstitutional and invalid.

Second, that the Migratory Bird Treaty Act, being in aid of the treaty between the United States of America and Great Britain, became, by virtue of such treaty, constitutional and valid.

The latter holding, as applied to the internal affairs of a state, we believe involves a fundamental contradiction. Under the facts of the instant case, the appellant contends that, in its ultimate analysis, such holding leads directly to the elimination of all reserved and unsurrendered powers belonging to the several states of the Union. It annuls the tenth amendment to the Constitution of the United States and annihilates the idea that the Constitution reserves to the states any powers which the Federal Government under the guise of a treaty may not usurp.

The treaty between the United States of America and Great Britain, relating to migratory game birds, formal parts omitted, is as follows:

CONVENTION BETWEEN UNITED STATES OF AMERICA AND GREAT BRITAIN.

"ARTICLE I.

The High Contracting Powers declare that the migratory birds included in the terms of this convention shall be as follows:

1. Migratory game birds:

(a) Anatidae, or waterfowl, including brant, wild ducks, geese and swans.

(b) Gruidae, or cranes, including little brown, sandhill, and whooping cranes.

(c) Rallidae, or rails, including coots, gallinules, and sora, and other rails.

(d) Limicolae, or shore birds, including avocets, curlew, dowitchers, godwits, knots, oyster catchers, pharlaropes, plovers, sandpipers, snipe, stilts, surf birds, turnstones, willet, woodcock and yellowlegs.

(e) Columbidae, or pigeons, including doves and wild pigeons.

2. Migratory insectivorous birds: Bobolinks, catbirds, chickadees, cuckoos, flickers, flycatchers, grossbeaks, humming birds, kinglets, martins, meadowlarks, nighthawks or bullbats, nuthatches, orioles, robins, shrikes, swifts, tanagers, titmice, thrushes, vireos, swallows, warblers, waxwings, whippoorwills, woodpeckers, and wrens, and all other perching birds which feed entirely or chiefly on insects.

3. Other migratory nongame birds: Auks, auklets, bitterns, fulmars, gannets, grebes, guillemots, gulls, herons, jaegers, loons, murres, petrels, puffins, shearwaters and terns.

ARTICLE II.

The High Contracting Powers agree that, as an effective means of preserving migratory birds, there

shall be established the following close seasons during which no hunting shall be done except for scientific or propagation purposes under permits issued by proper authorities.

1. The close season on migratory game birds shall be between March 10 and September 1, except that the close season on the Limicolae, or shore birds, in the maritime Provinces of Canada and in those States of the United States bordering on the Atlantic Ocean which are situated wholly or in part north of Chesapeake Bay shall be between February 1 and August 15, and that Indians may take at any time scoters for food but not for sale. The season for hunting shall be further restricted to such period not exceeding three and one-half months as the High Contracting Powers may severally deem appropriate and define by law or regulation.

2. The close season on migratory insectivorous birds shall continue throughout the year.

3. The close season on other migratory non-game birds shall continue throughout the year, except that Eskimos and Indians may take at any season auks, auklets, guillemots, murres, and puffins, and their eggs, for food and their skins for clothing, but the birds and eggs so taken shall not be sold or offered for sale.

ARTICLE III.

The High Contracting Powers agree that during the period of 10 years next following the going into effect of this convention there shall be a continuous close season on the following migratory game birds, to wit:

Band-tailed pigeons; little brown, sandhill and whooping cranes, swans, curlew and all shorebirds (except the black-breasted and golden plover, Wilson or jacksnipe, woodcock, and the greater and lesser yellowlegs); provided, that during such 10 years the close seasons on cranes, swans, and curlew in the Province of British Columbia shall be made by the

proper authorities of that Province within the general dates and limitations elsewhere prescribed in this convention for the respective groups to which these birds belong.

ARTICLE IV.

The High Contracting Powers agree that special protection shall be given the wood duck and the eider duck, either (1) by a close season extending over a period of at least five years, or (2) by the establishment of refuges, or (3) by such other reegu lations as may be deemed appropriate.

ARTICLE V.

The taking of nests or eggs of migratory game or insectivorous or nongame birds shall be prohibited except for scientific or propagating purposes, under such laws or regulations as the High Contracting Powers may severally deem appropriate.

ARTICLE VI.

The High Contracting Powers agree that the shipment or export of migratory birds or their eggs from any State or Province, during the continuance of the close season in such State or Province, shall be prohibited except for scientific or propagating purposes, and the international traffic in any birds or eggs at such time captured, killed, taken, or shipped at any time contrary to the laws of the State or Province in which the same were captured, killed, taken, or shipped shall be likewise prohibited. Every package containing migratory birds or any parts thereof or any eggs of migratory birds transported, or offered for transportation from the Dominion of Canada into the United States or from the United States into the Dominion of Canada, shall have the name and address of the shipper and an accurate statement of the contents clearly marked on the outside of such package.

ARTICLE VII.

Permits to kill any of the above-named birds which, under extraordinary conditions, may become seriously injurious to the agricultural or other interests in any particular community may be issued. by the proper authorities of the High Contracting Powers under suitable regulations prescribed therefor by them respectively, but such permits shall lapse, or may be canceled, at any time when, in the opinion of said authorities, the particular exigency has passed, and no birds killed under this article shall be shipped, sold, or offered for sale.

ARTICLE VIII.

The High Contracting Powers agree themselves to take, or propose to their respective appropriate law-making bodies, the necessary measures for insuring the execution of the present convention.

ARTICLE IX.

The present convention shall be ratified by the President of the United States of America, by and with the advice and consent of the Senate thereof, and by His Britannic Majesty. The ratifications shall be exchanged at Washington as soon as possible and the convention shall take effect on the date of the exchange of the ratifications. It shall remain in force for 15 years, and in the event of neither of the High Contracting Powers having giving notification, 12 months before the expiration of said period of 15 years, of its intention of terminating its operation, the convedtiod shall continue tu remain in force for one year and so on from year to year.

The Migratory Bird Treaty Act above referred to, approved July 3rd, 1918, U. S. Compiled Statutes of 1918, p. 1795, is as follows:

MIGRATORY BIRD TREATY ACT.

"AN ACT To give effect to the convention between the United States and Great Britain for the protection of migratory birds concluded at Washington, August sixteenth, nineteen hundred and sixteen, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act shall be known by the short title of the 'Migratory Bird Treaty Act.'

Sec. 2. That unless and except as permitted by regulations made as hereinafter provided, it shall be unlawful to hunt, take, capture, kill, attempt to take, capture, or kill, possess, offer for sale, cell, offer to purchase, purchase, deliver for shipment, ship, cause to be shipped, deliver for transportation transport, cause to be transported, carry or cause to be carried by any means whatever, receive for shipment transportation or carriage, or export, at any time or in any manner, any migratory bird, included in the terms of the convention between the United States and Great Britain for the protecton of migratory birds concluded August sixteenth, nineteen hundred and sixteen, or any part, nest, or egg of any such birds.

Sec. 3. That subject to the provisions and in order to carry out the purposes of the convention, the Secretary of Agriculture is authorized and directed from time to time, having due regard to the zones of temperature and to the distribution, abundance, economic value, breeding habits, and times and lines of migratory flight of such birds, to determine when, to what extent, if at all, and by what means, it is compatible with the terms of the convention to allow hunting, taking, capture, killing, possession, sale, purchase, shipment, tradsportation, carriage, or export of any such bird, or any part, nest, or egg thereof, and to adopt suitable regula-

tions permitting and governing the same, in accordance with such determinations, which regulations shall become effective when approved by the President.

Sec. 4. That it shall be unlawful to ship, transport, or carry, by any means whatever, from one State, Territory, or District to or through another State, Territory, or District, or to or through a foreign country, any bird, or any part, nest, or egg thereof, captured, killed, taken, shipped, traansported, or carried at and time contrary to the laws of the State, Territory, or District in which it was captured, killed, or taken, or from which it was shipped, transported, or carried. It shall be unlawful to import any bird, or any part, nest or egg thereof, captured, killed, taken, shipped, transported, or carried contrary to the laws of any Province of the Dominion of Canada in which the same was captured, killed, or taken, or from which it was shipped, transported, or carried.

Sec. 5. That any employee of the Department of Agriculture authorized by the Secretary of Agriculture to enforce the provisions of this act shall have power, without warrant to arrest any person committing a violation of this act in his presence or view and to take such person immediately for examination or trial before an officer or court of competent jurisdiction; shall have power to execute any warrant or other process issued by an officer or court of competent jurisdiction for the enforcement of the provisions of this act; and shall have authority, with a search warrant, to search any place. The several judges of the courts established under the laws of the United States, and United States Commissioners may, within their respective jurisdictions, upon proper oath or affirmation showing probable cause, issue warrants in all such cases. All birds, or parts, nests, or eggs thereof, captured, killed, taken, shipped, transported, carried or possessed

contrary to the provisions of this act or of any regulations made pursuant thereto shall, when found, be seized by any such employee, or by any marshal or deputy marshal, and upon conviction of the offender or upon judgment of a court of the United States that the same were captured, killed, taken, shipped, transported, carried, or possessed contrary to the provisions of this act, or of any regulation made pursuant thereto, shall be forfeited to the United States and disposed of as directed by the court having jurisdiction.

Sec. 6. That any person, association, partnership, or corporation who shall violate any of the provisions of said convention or of this act, or who shall violate or fail to comply with any regulation made pursuant to this act, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not more than $500 or be imprisoned not more than six months, or both.

Sec. 7. That nothing in this act shall be construed to prevent the several States and Territories from making or enforcing laws or regulations not inconsistent with the provisions of said convention or of this act, or from making or enforcing laws or regulations which shall give further protection to migratory birds, their nests, and eggs, if such laws or regulations do not extend the open season for such birds beyond the dates approved by the President in accordance with section three of this act.

Sec. 8. That until the adoption and approval, pursuant to section three of this act, of regulations dealing with migratory birds and their nests and eggs, such migratory birds and their nests and eggs as are intended and used exclusively for scientific or propagating purposes may be taken, captured, killed, possessed, sold, purchased, shipped, and transported for such scientific or propagating purposes if and to the extent not in conflict with the laws of the State, Territory, or District in which they are taken

captured, killed, possessed, sold, or purchased or in or from which they are shipped or transported if the packages containing the dead bodies or the nests or eggs of such birds when shipped and transported shall be marked on the outside thereof so as accurately and clearly to show the name and address of the shipper and the contents of the package.

Sec. 9. That the unexpended balances of any sums appropriated by the agricultural appropriation acts for the fiscal years nineteen hundred and seventeen and nineteen hundred and eighteen, for enforcing the provisions of the act approved March fourth, nineteen hundred and thirteen, relating to the protection of migratory game and insectivorous birds, are hereby reappropriated and made available until expended for the expenses of carrying into effect the provisions of this act and regulations made pursuant thereto, including the payment of such rent, and the employment of such persons and means, as the Secretary of Agriculture may deem necessary, in the District of Columbia and elsewhere, co-operation with local authorities in the protection of migratory birds, and necessary investigations connected therewith: *Provided*, That no person who is subject to the draft for service in the Army or Navy shall be exempted or excused from such service by reason of his employment under this act.

Sec. 10. That if any clause, sentence, paragraph, or part of this act shall for any reason, be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, or part thereof directly involved in the controversy in which such judgment shall have been rendered.

Sec. 11. That all acts or parts of acts inconsistent with the provisions of this act are hereby repealed.

Sec. 12. Nothing in this act shall be construed to prevent the breeding of migratory game birds on farms and preserves and the sale of birds so bred under proper regulations for the purpose of increasing the food supply.

Sec. 13. That this act shall become effective immediately upon its passage and approval."

MISSOURI LAWS.

The particular section of the game law of Missouri which is in direct conflict with the federal act and regulation, is as follows:

"No person shall take, capture or kill, by any means whatever, any game birds except the following named game birds between the following dates (both inclusive): Wild turkey—November 1st to December 31st of each year. Quail (bobwhite, partridge) and woodcock—November 10th to December 31st of each year. Ducks, geese, brant, snipe, black breasted and golden plover, greater and lesser yellowlegs, rails, coots and gallinules—*Jnauary 1st to April 30th and September 15th to December 31st of each year.* Doves—August 1st to November 10th of each year. Anyone who shall violate any of the provisions of this section shall, upon conviction thereof, be punished by a fine of not less that twenty-five dollars ($25.00) nor more than fifty dollars ($50.00) for each offense, and an additional fine of five dollars ($5.00) for each bird injured, killed or possessed."

Sec. 6516, p. 290, Laws of 1915.

The following sections are taken from Chapter 49, Revised Statutes of Missouri, 1909, creating a fish and game commission and providing for the preservation of fish and game:

"The ownership of and title to all birds, fish and game, whether resident, migratory or imported, in the state of Missouri, not now held by private

ownership, legally acquired, is hereby declared to be in the state, and no fish, birds or game shall be caught, taken or killed in any manner or at any time, or had in possession, except the person so catching, taking, killing or having in possession shall consent that the title of said birds, fish and game shall be and remain in the state of Missouri, for the purpose of regulating and controlling the use and disposition of the same after such catching, taking or killing. The catching, taking, killing or having in possession of birds, fish or game at any time, or in any manner, by any person, shall be deemed a consent of said person that the title of the state shall be and remain in the state, for the purpose of regulating the use and disposition of the same, and said possession shall be consent to such title in the state."

Section 6508.

"Upon the payment of two dollars, unless otherwise provided, to the state game and fish commissioner, he is authorized to issue permits according to the provisions of this article."

Section 6572.

"It shall be unlawful for any person, after the passage of this article, to hunt in this state without first obtaining a license permitting him or her to do so. Such license shall be dated when issued, and shall authorize the person named therein to hunt during the calendar year of issue, and then subject only to the regulations and restrictions provided by law."

Section 6574.

"Any person who shall hunt in this state without being at the time of such hunting in possession of a license, as herein provided, duly issued to him (or her), which license shall cover the period in which he (or she) shall be hunting, or who shall furnish to another person a license issued to him (or her), shall be fined not less than twenty-five dollars nor

more than one hundred dollars and costs of prosecution."

Section 6581.

"All moneys sent to the state treasurer in payment of hunting licenses, other licenses, penalties and forfeitures shall be set aside by the state treasurer and shall constitute a fund known as the 'game protection fund,' for the payment of salary of the state game and fish commissioner and his necessary expenses; for the payment of deputy game and fish commissioners and their necessary expenses; also, the buying, shipping, keeping, propagating and preserving of game. . . . . ."

Section 6585.

REGULATIONS—MIGRATORY BIRD TREATY ACT.

To show the conflict between the regulations of the Migratory Bird Treaty Act as proclaimed by the President on July 31st, 1918, and the law of the state of Missouri relating to migratory birds, we quote the following taken from said proclamation:

"REGULATION 4.—OPEN SEASONS ON AND POSSESSION OF CERTAIN MIGRATORY GAME BIRDS.

"For the purpose of this regulation, each period of time herein prescribed as an open season shall be construed to include the first and last days thereof.

"Waterfowl (except wood duck, eider ducks, and swans), rails, coot, gallinules, black-bellied and golden plovers, greater and lesser yellowlegs, woodcock, Wilson snipe or jacksnipe, and mourning and white-winged doves may be taken each day from half an hour before sunrise to sunset during the open seasons prescribed therefor in this regulation, by the means and in the numbers permitted by Regulations 3 and 5 hereof, respectively, and when so taken, each species may be possessed any day during the respective open seasons herein prescribed therefor

and for an additional period of 10 days next succeeding said open season.

"*Waterfowl (except wood duck, eider ducks, and swans), coot, gallinules, and Wilson snipe or jack snipe.*—The open seasons for waterfowl (except wood duck, eider ducks, and swans), coot, gallinules and Wilson snipe or jacksnipe shall be as follows:

"In Maine, New Hampshire, Vermont, Massachusetts, New York (except Long Island), Pennsylvania, Ohio, West Virginia, Kentucky, Indiana, Michigan, Wisconsin, Illinois, Minnesota, Iowa, *Missouri*, North Dakota, South Dakota, Nebraska, Kansas, Colorado, Wyoming, Montana, Idaho, Nevada, and that portion of Oregon and Washington lying east of the summit of the Cascade Mountains the open season shall be from September 16 to December 31;

* * * * * * * * *

(All italics in this brief may be treated by the court as ours.)

SPECIFICATION OF ERRORS.

(1) The court erred in holding that there was a want of equity in the bill of complaint, and in dismissing such bill of complaint.

(2) The court erred in holding the statute of the United States, described as the "Migratory Bird Treaty Act," approved July 3rd, 1918, constitutional.

(3) The court erred in holding that the convention between the United States and Great Britain, proclaimed to be effective December 8th, 1916, pursuant to which said Migratory Bird Treaty Act was enacted, did not invade powers and property rights reserved to the state of Missouri by the Constitution of the United States.

F 2—B 600

ARGUMENT.

FOREWORD.

Involving as this case does the right of the state of Missouri to maintain inviolate a trust which it holds for the benefit of all its people, and to maintain the right to exercise the power of police, an incident of state sovereignty and reserved to the States by the Constitution, it calls for a review of the form and the fundamentals of the Government designed by the Constitution of the United States.

Instinctively in a matter of this character we turn to "authorities." Original or novel arguments, were they possible, have little place in the determination of the constitutional powers of State and Federal governments at this late day.

We wish, not to create, but to revive an atmosphere: the atmosphere breathed by those who framed and those who ratified and first amended the Constitution of the United States. If the act of Congress now in question would have been unconstitutional then, it is unconstitutional now. The Constitution itself does not change.

> "The Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted it means now. Being a grant of powers to a government its language is general, and as changes come in social and political life it embraces in its grasp all new conditions which are within the scope of the powers in terms conferred. In other words, while the powers granted do not change, they apply from generation to generation to all things to which they are in their nature applicable. This in no manner abridges the fact of its changeless nature and meaning. *Those things which are within its grants of power, as those grants were*

understood when made, are still within them, and those things not within them remain still excluded. As said by Mr. Chief Justice Taney in Dred Scott v. Sandford, 19 How. 393, 426:

"'*It is not only the same in words, but the same in meaning, and delegates the same powers to the Government and reserves and secures the same rights and privileges to the citizens;* and as long as it continues to exist in its present form, it speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers, and was voted on and adopted by the people of the United States. Any other rule of construction would abrogate the judicial character of this court, and make it the mere reflex of the popular opinion or passion of the day.'"

South Carolina v. United States, 199 U. S. 447, 448, 50 L. Ed. 261.

I.

If an executive officer, federal or state, is committing, or is about to commit, acts unauthorized by or in violation of law, to the irreparable injury of the property rights of another, such action or threatened action is good ground for injunctive relief against such officer.

Philadelphia Company v. Stimpson, 223 U. S. 605, 619, 620;

Magruder v. Bell Fourche, 219 Fed. 72, 79;
Noble v. Railroad, 147 U. S. 165, 172;
School Magnetic Healing v. McAnnulty, 187 U. S. 94;
Dobbins v. Los Angeles, 195 U. S. 241;
Truax v. Raich, 239 U. S. 37;
Lane v. Watts, 234 U. S. 525, 540;
Davis v. Los Angeles, 189 U. S. 217;
Ex Parte Young, 209 U. S. 162;
United States v. Lee, 106 U. S. 196.

In a suit of the character of the one at bar, mere property rights and loss of revenue, however, are not the chief consideration. Rights are involved which may not be valued in money, but the infraction of which the state may insist shall be stopped. An adequate remedy can only be had in a suit by the state to enjoin such infraction.

State of Georgia v. Copper Co., 206 U. S. 230, 237; State of Missouri v. State of Illinois, 180 U. S. 208; State of Kansas v. State of Colorado, 185 U. S. 125; Glenwood Light & Water Co. v. Power Co., 239 U. S. 121.

"Some peculiarities necessarily mark a suit of this kind. If the state has a case at all, it is somewhat more certainly entitled to specific relief than a private party might be. It is not lightly to be required to give up quasi-sovereign rights for pay; and, apart from the difficulty of valuing such rights in money, if that be its choice, it may insist that an infraction of them shall be stopped."

State of Georgia v. Copper Co., 206 U. S. 230.

"Beyond its property rights it has an interest as a state in this large tract of land bordering on the Arkansas river. Its prosperity affects the general welfare of the state. The controversy rises, therefore, above a mere question of local private right and involves a matter of state interest, and must be considered from that standpoint. Georgia v. Tennessee Copper Co. 206 U. S. 230, 51 L. ed. 1038, 27 Sup. Ct. Rep. 618."

State of Kansas v. State of Colorado, 185 U. S. 125.

"An inspection of the bill discloses that the nature of the injury complained of is such that an adequate remedy can only be found in this court at the suit of the state of Missouri. It is true that no question of boundary is involved, nor of direct property rights belonging to the complainant state. But it must surely be conceded that, if the health

> and comfort of the inhabitants of a state are threatened, the state is the proper party to represent and defend them. * * * * * *
>
> "That suits brought by individuals, each for personal injuries threatened or received, would be wholly inadequate and disproportionate remedies, requires no argument."
>
> State of Missouri v. State of Illinois, 180 U. S. 208.

In the Court below it was urged that the application for injunction could not be maintained against the Federale Game Warden, because it was in effect a suit against the United States. We incline to the opinion that the Government will abandon such contention. The cases of Hamilton, Collector of Internal Revenue, appellant, vs. Kentucky Distilleries & Warehouse Company, Dryfoos, et al., appellants, vs. Edwards, Collector of Internal Revenue, and Ruppert vs. Caffey, United States Attorney and McElligott, Acting and Deputy Collector of Internal Revenue, involving the constitutionality of the War Time Prohibition Act, and recently decided by this Court, were all applications for injunctions against Federal officers. That this was a proper method to test the constitutionality of the statutes involved in those cases is evidenced by the fact that no discussion of the proposition appears in the opinion.

When the sovereign power of the State of Missouri is invaded it seems to us self-evident that the State in its own name is pre-eminently the party to preserve and defend that sovereignty. Can it be that in the circumstances the State of Missouri is impotent and must depend for the protection of its sovereign rights and powers upon the submission to arrest and prosecution by some private individual for a violation of the Migratory Bird Law? The time worn maxim that equity does not suffer a wrong to be without a remedy is applicable here. If the State of Missouri may not itself restrain an invasion of its sovereignty by the Federal Government, there exists no way in which it can defend—an unthinkable situation. To so protect itself it cannot go to war. Surely, it will be permitted to come to Court.

II.

Our government had no prototype in history. The Federal Government and the States are separate and distinct sovereignties. The one, within the sphere of its delegated powers is supreme; the other, within the sphere of its undelegated and reserved powers, is no less supreme. It was never intended that the states should be shorn of their sovereignty in interna affairs.

Declaration of Independence, last par.;
Articles of Confederation, Art. II;
Constitution of the United States, Arts. IX and X, Secs. 3 and 4;
Collector v. Day, 11 Wlal. 113-124, 20 L. Ed. 122;
Lane County v. Oregon, 7 Wall. 71-76, 19 L Ed. 101;
Gordon v. United States, 117 U. S. 697-705;
Martin v. Hunter, 1 Wheat. 325.
Turner v. Williams, 194 U. S. 279-295, 48 L. Ed. 979;
McCulloch v. Maryland, 4 Wheat. 316, 4 L. Ed. 579;
Willoughby, Constitution, Vol. I, p. 66;
South Carolina v. United States, 199 U. S. 447.

"....., that these United Colonies are, and of right ought to be, FREE AND INDEPENDENT STATES; that they are absolved from all allegiance to the British crown, and that all political connection between them and the State of Great Britain is, and ought to be, totally dissolved; and that, as FREE AND INDEPENDENT STATES, they have full power to levy war, conclude peace, contract alliances, establish commerce, and to do all other acts and things which INDEPENDENT STATES may of right do."

Declaration of Independence, last par.

"Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is

not by this Confederation expressly delegated to the United States in Congress assembled."

Articles of Confederation, Art. II.

"The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."

Constitution of the United States, Amendment IX.

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Constitution of the United States, Amendment X.

"We pass, therefore, to the vital question in this case, and it is one of far-reaching significance. We have in this Republic a dual system of government, National and State, each operating within the same territory and upon the same persons; and yet working without collision, because their functions are different. There are certain matters over which the National Government has absolute control and no action of the State can interfere therewith, and *there are others in which the State is supreme, and in respect to them the National Government is powerless.* To preserve the even balance between these two governments and hold each in its separate sphere is the peculiar duty of all courts, pre-eminently of this—a duty oftentimes of great delicacy and difficulty."

South Carolina v. United States, 199 U. S. 447, 448, 50 L. Ed. 261.

"It is a familiar rule of construction of the Constitution of the Union, that the sovereign powers vested in the State governments by their respective constitutions, remained unaltered and unimpaired, except so far as they were granted to the government of the United States. That the intention of the framers of the Constitution in this respect might not be misunderstood, this rule of interpretation is expressly declared in the tenth article of the amendments. . . . The gov-

ıment of the United States, therefore, can claim no powers ich are not granted to it by the Constitution, and the powers ually granted must be such as are expressly given, or given necessary implication.

era

ərei "*The general government, and the States, although both exist within the same territorial limits,* are *separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres.* The former in its appropriate sphere is supreme; but the States within the limits of their powers not granted, or, in the language of the tenth amendment, 'reserved,' are as independent of the general government as that government within its sphere is independent of the States."

Collector v. Day, 11 Wall, 113, 124; 20 L. Ed. 122.

"This government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent to have required to be enforced by all those arguments which its enlightened friends, while it was depending before the people, found it necessary to urge. That principle is now universally admitted."

McCulloch v. Maryland, 4 Wheat. 316, 405; 4 L. Ed. 579.

"The latter doctrine, upon the contrary, would derive federal authority not from powers expressly granted, but from an abstraction, and would, at a stroke, equip the Federal Government with every power possessed by any other sovereign State.

"There can be no question as to the constitutional unsoundness, as well as of the revolutionary character, of the theory thus advanced. To accept it would be at once to overturn the long line of decisions that have held the United States Government to be one of limited, enumerated powers."

Willoughby on the Constitution, Vol. I, p. 66.

"By the Tenth Amendment the powers not delegated to the United States nor prohibited by it to the States, are re-

served to the States respectively or to the people. The reservation to the States respectively *can only mean the reservation of the rights of sovereignty which they respectively possessed before the adoption of the Constitution of the United States, and which they had not parted from by that instrument.* And any legislation by Congress beyond the limits of the power delegated, would be trespassing upon the rights of the States or the people, and would not be the supreme law of the land, but null and void; and it would be the duty of the courts to declare it so."

Gordon v. United States, 117 U. S. 697, 705.

"Both the States and the United States existed before the Constitution. The people, through that instrument, established a more perfect union, by substituting a national government, acting, with ample power, directly upon the citizens, instead of the Confederate government, which acted with powers, greatly restricted, only upon the States. But in many articles of the Constitution the *necessary existence of the States and, within their proper spheres, the independent authority of the States, is distinctly recognized.* To them nearly the whole charge of interior regulation is committed or left; to them and to the people all powers not expressly delegated to the National Government are reserved."

Lane County v. Oregon, 7 Wall. 71, 76; 19 L. Ed. 101.

"While undoubtedly the United States as a nation has all the powers which inhere in any nation, Congress is not authorized in all things to act for the nation, and too little effect has been given to the Tenth Article of the Amendments to the Constitution, . . . The powers the people have given to the General Government are named in the Constitution, and all not there named, either expressly or by implication, are reserved to the people and can be exercised only by them, or upon further grant from them."

Turner v. Williams, 194 U. S. 279, 295-296; 48 L. Ed. 979.

". . . . . ., it is perfectly clear that the *sovereign powers vested in the State governments*, by their respective constitutions,

remained unaltered and unimpaired, except so far as they were granted to the government of the United States.

"These deductions do not rest upon general reasoning, plain and obvious as they seem to be. *They have been positively recognized by one of the articles in amendment of the Constitution*, which declares, that 'powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the *States* respectively, or *to the people*.'

"The government, then, of the United States, can claim no powers which are not granted to it by the Constitution, and the powers actually granted must be such as are expressly given, or given by necessary implication."

Martin v. Hunter, 1 Wheat. 304, 325-326.

". . . . . .: for since the protection of the health, morals, etc., of a people is one of the essential duties of the State, it can neither by contract nor concession of any kind, whether for value or without, divest itself of this obligation. To do so would be to abdicate; to part with it would be State suicide; impossible under the decision in Texas v. White (7 Wall. 700; 19 L. Ed. 227) that declares our government to be '*an indestructible union composed of indestructible States;*' and which was reaffirmed in Collector v. Day (11 Wall. 125, 20 L. Ed. 122). 'Without them (the States), the general government itself would disappear from the family of nations.' "

Tucker, Limitations on the Treaty-making Power, p. 297.

". . . . .: and further, that being an original and reserved power, and the judicial officers appointed under it being a means of instrumentality employed to carry it into effect, the right and necessity of its unimpaired exercise, and the exemption of the officer from taxation by the general government, stand upon as solid ground and are maintained by principles and reasons as cogent as those which led to the exemption of the Federal officer in Dobbins v. The Commissioners of Erie from taxation by the State; *for in this respect*,

that is, in respect to the reserved powers, the State is as sovereign and independent as the general government."

Collector v. Day, 11 Wall. 125, 126; 20 L. Ed. 122.

III.

Under the ancient law, feudal law, and the common law in England the absolute control of wild game was an attribute of government and a necessary incident of sovereignty. When, therefore, the United Colonies became "FREE AND INDEPENDENT STATES" with full power to do all "acts and things which INDEPENDENT STATES may of right do," the power to control the taking of wild game passed to the States.

Geer v. Connecticut, 161 U. S. 519, l. c. 523-530;
Ward v. Race Horse, 163 U. S. 504.

"The practice of the government of England from the earliest time to the present has put into execution the authority to control and regulate the taking of game.

"Undoubtedly this attribute of government to control the taking of animals *ferae naturae*, which was thus recognized and enforced by the common law of England, was vested in the colonial governments, where not denied by their charters, or in conflict with grants of the royal prerogative. It is also certain that the power which the colonies thus possessed passed to the states with the separation from the mother country."

Geer v. Connecticut, *supra*, l. c. 527-8.

"The power of a state to control and regulate the taking of game cannot be questioned."

Ward v. Race Horse, 163 U. S. 504, l. c. 507.

"The argument, now advanced, in favor of the continued existence of the right to hunt over the land mentioned in the treaty, after it had become subject to state authority, admits that the privilege would cease by the mere fact that the United States disposed of its title to any of the land, although such disposition, when made to an individual, would give him no authority over game, and yet that the privilege continued when the United States had called into being a sovereign state,

a necessary incident of whose authority was the complete power to regulate the killing of game within its borders."

Ward v. Race Horse, 163 U. S. 504, l. c. 510.

It would seem that if the states are to be shorn of their control over wild game within their respective borders, they are to be *less* than was intended by the Constitution when ratified by the people. *If it had even been suggested* that, although Congress had no power to control the taking of wild game within the borders of any state, yet indirectly by means of a treaty with some foreign power it could acquire the power and by this means its long arm could reach into the states and take food from the tables of their people, who can for one moment believe that such a Constitution would have been ratified?

Wild game and the right of the people thereto has always been a "touchy" subject with all English speaking people. It was of sufficient importance to be a part of the *Magna Charta* and the "Charter of the Forests." (See Parker v. People, 111 Ill., 581, l. c. 647.)

IV.

Missouri, upon her admission to the Union, became entitled to and possessed of *all the rights and dominion and sovereignty* which belonged to the original states. She was admitted, and could be admitted, only on the same footing with them. Equality of constitutional right and power is the condition of all the states of the Union, old and new.

Escanaba v. Chicago, 107 U. S. 678, 688;
Ward v. Race Horse, 163 U. S. 504, 513;
Cardwell v. Bridge Co., 113 U. S. 205, 212;
Willamette, Oregon, v. Hatch, 125 U. S. 1;
Pollard v. Hagan, 3 How. 212;
Withers v. Buckley, 61 U. S. 84, 92;
Permoli v. Municipality, 44 U. S. 589.

"The power of all the states to regulate the killing of game within their border *will not be gainsaid*, yet, if the treaty applies to the unoccupied land of the United States in the state

of Wyoming, that state would be bereft of such power, since every isolated piece of land belonging to the United States as a private owner, so long as it continued to be unoccupied land, would be exempt in this regard from the authority of the state. Wyoming, then, will have been admitted into the Union, not as an equal member, but as one shorn of a legislative power vested in all the other states of the Union, *a power resulting from the fact of statehood and incident to its plenary existence.*"

Ward v. Race Horse, 163 U. S. 504, l. c. 514.

"On her admission she at once became entitled to and possessed of all the rights of dominion and sovereignty which belonged to the original states. She was admitted, and could be admitted, only on the same footing with them. The language of the resolution admitting her is 'on an equal footing with the original States *in all respects whatever.*' 3 Stat. 536. Equality of constitutional right and power is the condition of all the States of the Union, old and new."

Escanaba v. Chicago, 107 U. S. 678, 688.

"When Alabama was admitted into the Union, on an equal footing with the original states, she succeeded to all the rights of sovereignty, jurisdiction, and eminent domain which Georgia possessed at the date of the cecession, except so far as this right was diminished by the public lands remaining in the possession and under the control of the United States, for the temporary purposes provided for in the deed of cession and the legislative acts connected with it. Nothing remained to the United States, according to the terms of the agreement, but the public lands. And, if an express stipulation had been inserted in the agreement, granting the municipal right of sovereignty and eminent domain to the United States, such stipulation would have been void and inoperative; *because the United States have no constitutional capacity to exercise municipal jurisdiction, sovereignty, or eminent domain, within the limits of a state or elsewhere, except in the cases in which it is expressly granted.*

Pollard's Lessee v. Hagan, 3 How. 212, 223.

V.

This power of the state over wild game within its borders, which "cannot be questioned" and "will not be gainsaid," is derived from the peculiar nature of such property and its common ownership by all the citizens of the state in their collective sovereign capacity. The state in its sovereign capacity is the representative of the people in their common ownership of the wild game within the borders of the state, and *holds the same in trust for the benefit of all its people.*

Geer v. Connecticut, 161 U. S. 519, l. c. 529, 530;
McCready v. Virginia, 94 U. S. 391;
Martin v. Waddell, 16 Pet. 410;
United States v. Shauver, 214 Fed. 154;
United States v. M'Cullagh, 221 Fed. 288, 294;
Rupert v. United States, 181 Fed. 87, 90;
Magner v. People, 97 Ill. 320, 333;
Gentile v. State, 29 Ind. 409, 417;
Ex Parte Maier, 103 Cal. 476, 483;
Chambers v. Church, 14 R. I. 398, 400;
Manchester v. Massachusets, 139 U. S. 240;
Patsone v. Pennsylvania, 232 U. S. 138;
Abby Dodge v. United States, 223 U. S. 166;
Smith v. Maryland, 18 How. 71, 15 L. Ed. 270;
Carey v. South Dakota, U. S. Sup. Ct. 346, May Term, 1919;
Silz v. Hesterberg, 211 U. S. 31;
In re Deininger, 108 Fed. 623;
Heim v. McCall, 239 U. S. 175.

"Whilst the fundamental principles upon which the common property in game rests have undergone no change, the development of free institutions has led to the recognition of the fact that the power or control lodged in the state, resulting from this common ownership, is to be exercised like all other powers of government as a trust for the benefit of the people.

. . . . . .

" . . . . . The proposition that the state may not forbid carrying it beyond her limits involves, therefore, the contention that a state cannot *allow its own people the enjoyment of the benefits of the property belonging to them in common*, without at the same time permitting the citizens of other states to participate in that *which they do not own.* . . . . . In view of the authority of the State to affix conditions to the killing and sale of game, predicated as is this power on the peculiar nature of such property and its common ownership by all the citizens of the state, it may well be doubted whether commerce is created by an authority given by a state to reduce game within its borders to possession, provided such game be not taken, when killed, without the jurisdiction of the state. *The common ownership imports the right to keep the property, if the sovereign so chooses, always within its jurisdiction for every purpose.* . . . . ."

Geer v. Connecticut, 161 U. S. 519, l. c. 529-530.

"In like manner, the States own the tide-waters themselves, and the fish in them, so far as they are capable of ownership while running. For this purpose the State represents its People, and the ownership is that of the People in their united sovereignty. Martin v. Waddell, 16 Pet., 410. . . . . Such an appropriation is, in effect, nothing more than a regulation of the use by the People of their common property. The right which the People of the State thus acquire comes not from their citizenship alone, but from their citizenship and property combined. *It is, in fact, a property right*, and not a mere privilege or immunity of citizenship."

McCready v. Virginia, 94 U. S. 391, l. c. 394; 24 L. Ed. 248.

"Are migratory birds, when in a state on their usual migration, the property of the United States or of the states where they are found? If they are the property of the nation the states would have no power to regulate, control or prohibit the hunting or killing of them. But the rule of law which all the American Courts have recognized is that animals *ferae*

naturae, denominated as game, are owned by the states, not as proprietors, but in their sovereign capacity as the representatives and for the benefit of all their people id common. This principle has not only been maintained by all the highest courts of the states in which the question has arisen, but has had the approval of the Supreme Court of the United States in every case which has come before it."

United States v. Shauver, 214 Fed. 156, 157.

"It is to be remembered that the subject of this whole discussion is *wild game, which the state may preserve for its own citizens if it pleases.*

Patsone v. Pennsylvania, 232 U. S. 138, l. c. 145, 146; 58 L. Ed. 544.

"While it is true that it would be possible to interpret the statute as applying to sponges taken in local waters, it is equally certain that it is susceptible of being confined to sponges taken outside of such waters. In view of the clear distinction between state and national power on the subject, long settled as the time the act was passed, and the rule of construction just stated, we are of opinion that *its provisions must be construed as alone applicable to the subject within the authority of Congress to regulate*, and, therefore, be held not to embrace *that which was not within such power.*"

The Abby Dodge v. United States, 223 U. S. 166, l. c. 175; 56 L. Ed. 393.

The fact that the State holds the wild game *in trust* for its people would seem to put it beyond the reach of Congress whether it (Congress) acted alone and directly or in conjunction with some foreign power and *indirectly*. If Congress alone cannot take over such *trust* from the State, how can it exercise such trust by means of a convention with some foreign power? If this trust may be destroyed by the treaty-making power, is there any trust which is inviolate?

VI.

But the power of the state over wild game within its borders is not dependent solely upon the authority which

the state derives from common ownership and the trust for the benefit of the people; the power of the state to control wild game is a necessary incident of the power of police. The power of police is an attribute of state sovereignty.

Geer v. Connecticut, 161 U. S. 519, 534;
City v. Miln, 11 Peters, 102, 132-133;
Pierce v. State, 13 N. H. 536, 576 et seq.;
Cutler v. Dibble, 21 How. 366;
Federalist, No. XLV (Hallowell, 1852), pp. 215-216;
Compagnie v. Board, 186 U. S. 380;
Groves v. Slaughter, 15 Pet. 449, 511;
Prigg v. Commonwealth, 15 Pet. 539, 625;
Commonwealth v. Alger, 7 Cush. 53, 84;
Thorpe v. Rutland, 27 Vt. 140, 149;
Beer v. Massachusetts, 97 U. S. 25, 33;
Rupert v. U. S., 181 Fed. 87, 90;
Cook v. Marshall, 196 U. S. 261;
In re Rahrer, 140 U. S. 545;
House v. Mayes, 219 U. S. 270, 281, 282;
Broadnax v. Missouri, 219 U. S. 292, 293;
People v. Becker, 241 U. S. 556;
Cantini v. Tillman, 54 Fed. 969;
Plumley v. Massachusetts, 155 U. S. 461, 473.

"In the American Constitution system, the power to establish the ordinary regulations of police has been left with the individual states, and it cannot be taken from them, either wholly or in part, and exercised under legislation of Congress."

Cooley, Constitutional Limitations (7 Ed.), p. 831.

"The law of each state 'is the source of all of those relative obligations and duties enforceable by law, the observance of which the State undertakes to enforce as its public policy. And it was in contemplation of the continued existence of this separate system of law in each State that the Constitution of the United States was framed and ordained with such legislative powers as are therein granted expressly or by reasonable implications.' "

Smith v. Alabama, 124 U. S. 476.

"State power to promote public health, good order and prosperity 'is a power originally and always belonging to the states, not surrendered by them to the General Government nor directly restrained by the Constitution of the United States, *and essentially exclusive.*' "

In re Rahrer, 140 U. S. 554.

"But the states have full power to regulate within their limits matters of internal police, including in that general designation whatever will promote the peace, comfort, convenience and prosperity of their people."

Escanaba v. Chicago, 107 U. S. 678, 683, quoted in Ward v. Race Horse, 163 U. S. 504, l. c. 513.

"The absolute ownership of wild game is vested in the people of the state, and the Legislature, as the representative of the people, may grant to individuals the right to hunt and kill game at such times and upon such terms and under such restrictions, as it may see proper, or prohibit it altogether, as the Legislature may deem best. *The regulation of such a matter falls within the police power of the State.*"

State v. Heger, 194 Mo. 707.

"The power of the state police, so far as it relates to those matters which have been the subjects of foreign commerce, or of commerce among the states, acts upon them generally after the transit has been accomplished. When the particular trade between another nation and this country, or between different states, is ended, and the property which formed the subject of it, from being property in one government, and then *in transitu*, has, by that commerce and change of place become part and parcel of the mass of property in a particular state, released from the charges of the national government, and from its superintendence, tha. property can claim no exemption from the operation of the laws of the state where it is situate, regulating its safe-keeping, sale and use—those laws being general laws, affecting other property of a like character in a similar manner; and being in good faith, but parts of the internal police of the state where it is situated,

and not, in effect, regulations of the commerce which brought it there. The fact that the article had been transported from another nation, or state, and that it had before that time been the subject-matter of commerce between two countries, or states, cannot, after such change is perfected, confer upon it, in respect to the operation of state police, any character different from that possessed by other component parts of the general mass of property there."

Pierce v. State, 13 N. H. 536, l. c. 579.

" . . . . . Police, relates only to the internal concerns of one state, and commerce, within it, is purely a matter of internal regulation, when confined to those articles which have become so distributed as to form items in the common mass of property. It follows, that any regulation which affects the commercial intercourse between any two or more states, referring solely thereto, is within the powers granted exclusively to Congress; and that those regulations which affect only the commerce carried on within one state, or *which refer only to subjects of internal police, are within the powers reserved.*"

Groves v. Slaughter, 15 Peters, 449, 511.

"The grant of authority over a purely federal matter was not intended to destroy the local power always existing and carefully reserved to the states in the Tenth Amendment to the Constitution.

"Police regulations relating to the internal trade and affairs of the states have been uniformly recognized as within such control. 'This,' said this court in *United States v. Dewitt*, 9 Wall. 41, 45, 19 L. Ed. 593, 'has been so frequently declared by this court, results so obviously from the terms of the Constitution, and has been so fully explained and supported on former occasions, that we think it unnecessary to enter again upon the discussion.' See *Keller v. United States*, 213 U. S. 138, 144, 145, 146, 29 Sup. Ct. 470, 53 L Ed. 737, 16 Ann. Cas. 1066; Cooley's Constitutional Limitations (7th Ed.), p. 11.

"In the judgment which established the broad power of Congress over interstate commerce, Chief Justice Marshall said (9 Wheat. 203, 6 L. Ed. 23):

" 'They (inspection laws) act upon the subject, before it becomes an article of foreign commerce, or of commerce among the states, and prepare it for that purpose. They form a portion of that immense mass of legislation, which embraces everything within the territory of a state, not surrendered to the general government; all of which can be most advantageously exercised by the states themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a state, and those which respect turnpike roads, ferries, etc., are component parts of this mass.'

* * * * * * * * *

". . . . . The maintenance of the authority of the states *over matters purely local is as essential to the preservation of our institutions as is the conservation of the supremacy of the federal power in all matters entrusted to the nation by the federal Constitution.*

"In interpreting the Constitution it must never be forgotten that the nation is made up of states to which are entrusted the powers of local government. And to them and to the people the powers not expressly delegated to the national government are reserved. *Lane County v. Oregon*, 7 Wall. 71, 76, 19 L. Ed. 101. The power of the states to regulate their purely internal affairs by such laws as seem wise to local authority is inherent and has never been surrendered to the general government. *New York v. Miln*, 11 Pet. 102, 139, 9 L. Ed. 648; Slaughter House cases, 16 Wall. 36, 63, 21 L. Ed. 394; *Kidd v. Pearson, supra.*"

Hammer v. Dagenhart, 247 U. S. 251 (38 Sup. Ct. Rep. 529.)

"As a police regulation, relating exclusively to the internal trade of the states, it can only have effect where the legislative authority of Congress excludes, territorially, all state legis-

lation, as, for example, in the District of Columbia. *Within state limits, it can have no constitutional operation.* This has been so frequently declared by this court, results so obviously from the terms of the Constitution, and has been so fully explained and supported on former occasions (License cases, 5 How. 504; Passenger cases, 7 How. 283); License Tav. cases, 5 Wall. 47 (720 U. S. XVIII, 500, and the cases cited) that we think it unnecessary to enter again upon the discussion."

U. S. v. Dewitt, 9 Wall. 41 (19 L. Ed. 593.)

'Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health and property of the citizens, and to the preservation of good order and the public morals. The legislature cannot by any contract, divest itself of the power to provide for these objects. They belong emphatically to that class of objects which demand the application of the maxim *salus populi suprema lex;* and they are to be attained and provided for by such appropriate means as the legislative discretion may devise. That discretion can no more be bargained away than the power itself."

Beer Co. v. Massachusetts, 97 U. S. 32, 33; 24 L. Ed. 989.

"All the rights and powers which the states possessed before the adoption of that constitution, they still retain, and may exercise, unless they are taken away, limited, or modified by it. The language of the tenth article of the amendments is express: 'The powers not delegated to the United States by the constitution, not prohibited by it to the states, are reserved to the states respectively, or to the people.' *It is very clear that the power of regulating the internal trade, and matters of police, of the several states, is not granted to the United States, nor prohibited to the states.*"

Pierce v. The State, 13 N. H. 536, l. c. 572.

". . . . . the police power, power vested in the legislature by the Constitution, to make, or ordain or establish

all manner of wholesome and reasonable laws, statutes and ordiances, either with penalties, or without, not repugnant to the Constitution, as they shall judge to be for the good and welfare of the Commonwealth, and of the subjects of the same.

"It is much easier to perceive and realize the existence and sources of this power, than to mark its boundaries, or prescribe limits to its exercise."

Commonwealth v. Alger, 7 Cushing 85.

"There is also the general police power of the State, by which persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health, and prosperity of the State, *of the perfect right, in the legislature to do which no question ever was, or, upon acknowledged general principles, ever can be made, so far as natural persons are concerned.*"

Thorpe v. Rutland, 27 Vt. 140.

"But we do not place our opinion on this ground. We choose rather to plant ourselves on what we consider impregnable positions. They are these: *That a State has the same undeniable and unlimited jurisdiction over all persons and things, within its territorial limits, as any foreign nation; where that jurisdiction is not surrendered or restrained by the Constitution of the United States.* That, by virtue of this, it is not only the right, but the bounden and solemn duty of a State to advance the safety, happiness and prosperity of its people, and to provide for its general welfare by any and every act of legislation, which it may deem to be conducive to these ends; where the power over the particular subject, or the manner of its exercise, is not surrendered or restrained, in the manner just stated. *That all those powers which relate to merely municipal legislation, or what may, perhaps, more properly be called internal police, are not thus surrendered or restrained; and that, consequently, in relation to these, the authority of a state is complete, unqualified and exclusive.*

City of New York v. Miln, 11 Peters, 139, 9 L. Ed. 648.

"The police power belonging to the States in virtue of their general sovereignty, 'extends over all subjects within the territorial limits of the States; and has never been conceded to the United States.' "

Prigg v. Pennsylvania, 16 Peters, 625, 10 L. Ed. 1060.

"They form a portion of that immense mass of legislation, which embraces everything within the territory of a State, not surrendered to the general government: *all which can be most advantageously exercised by the States themselves.* Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries, &c., are component parts of this mass.

No direct general power over these objects is granted to Congress; and, consequently, they remain subject to State legislation."

Gibbons v. Ogden, 9 Wheat, 1, 203, 6 L. Ed. 23.

"Whenever internal police is the object, the power is excepted from every grant, and reserved to the States."

Holmes v. Jennison, 14 Pet. 614, 619; 10 L. Ed. 579.

"It has been frequently decided by this Court, 'that the powers which relate to merely municipal regulations, or what may more properly be called internal police, *are not surrendered by the States, or restrained by the Constitution of the United States; and that consequently, in relation to these, the authority of a State is complete, unqualified, and conclusive.*' Without attempting to define what are the peculiar subjects or limits of this power, it may safely be affirmed, that every law for the restraint and punishment of crime, for the preservation of the public peace, health and morals, must come within this category."

License Cases, 5 How. 504, 631, 12 L. Ed. 256.

"For if the people of the several States of this Union reserved to themselves (as he elsewhere holds they did) the

power of expelling from their borders any person, or class of persons, whom it might deem dangerous to its peace, or likely to produce a physical or moral evil among its citizens, then any treaty or law of Congress invading this right, and authorizing the introduction of any person or description of persons against the consent of the State, *would be an usurpation of power which this court could neither recognize nor enforce.*"

Passenger Cases, 7 How. 466, 12 L. Ed. 779.

"The power of the State to impose restraints and burdens upon persons and property in conservation and promotion of the public health, good order and prosperity, *is a power originally and always belonging to the States, not surrendered by them to the general government nor directly restrained by the Constitution of the United States,* and *essentially exclusive.*"

In re Rahrer, 140 U. S. 554, 35 L. Ed. 572; 11 S. C. 65.

"The acknowledged police power of a State extends often to the destruction of property. A nuisance may be abated. Everything prejudicial to the health or morals of a city may be removed. Merchandise from a port where a contagious disease prevails, being liable to communicate the disease, may be excluded; and, in extreme cases, it may be thrown into the sea. This comes in direct conflict with the regulations of commerce; and yet no one doubts the local power. It is a power essential to self-preservation, and exists, necessarily, in every organized community. It is, indeed, the law of nature, and is possessed by man in his individual capacity. He may resist that which does him harm, whether he is assailed by an assassin, or approached by poison."

Thurlow v. The Commonwealth of Massachusetts, 5 How. 504, 589; 12 L. Ed. 256.

". . . . .; That such power in the State, generally referred to as its police power, is not granted by or derived from the Federal Constitution but exists independently of it, by reason of its never having been surrendered by the State to the General Government; that among the powers of the State, not surrendered—which power therefore remains with the State—

is the power to so regulate the relative rights and duties of all within its jurisdiction so as to guard the public morals, the public safety, and the public health, as well as to promote the public convenience and the common good; . . . . . ."

House v. Mayes, 219 U. S. 282, 55 L. Ed. 213.

"As a police regulation, relating exclusively to the internal trade of the States, it can only have effect where the legislative authority of Congress excludes, territorially, all State legislation, as, for example, in the District of Columbia. *Within State limits, it can have no constitutional operation.* This has been so frequently declared by this court, results so obviously from the terms of the Constitution, and has been so fully explained and supported on former occasions, that we think it unnecessary to enter again upon the discussion."

United States v. DeWitt, 9 Wall. 41; 19 L. Ed. 593.

If a source of food supply is not within the exclusive control of a state under its power of police, is there anything which is within the exclusive control of the police power of a state? If Congress by means of a treaty can tell the people of a state when and under what conditions they may eat wild game *which they own* in their collective sovereign capacity, and in and over which, while within the borders of the state, neither Congress nor any foreign nation can have, either under national or international law (see Behring Sea Arbitration, 32 Amer. Law Reg. 901), any property rights nor any power of control, then the Xth Amendment with its powers "reserved" to the states respectively or to the people, is a delusion, and they are states *in name only*, and our government a *very different government from that presupposed and intended by the people who ratified the Constitution.*

"If this extraordinary proposition can be taken as universally or as generally true, . . . the Constitution of the United States, with all its limitations on Federal power, and as it has been heretofore generally understood to be a special delegation of power, is a falsehood or an absurdity. It must be viewed as the creation of a power transcending that which called it into existence; a power single, universal, engrossing,

absolute. *Everything in the nature of civil or political rights is thus engulfed in federal legislation, and in the power of negotiating treaties.*"

Passenger Cases, 7 Howard, p. 474; 12 L. Ed. 702.

VII.

Upon the authority and principles of the cases hereinbefore cited it has been held that a prior act of Congress, approved March 4, 1913—which act is similar to the one now in question, save that it was not made in aid of any treaty—was unconstitutional and void.

United States v. Shauver, 214 Fed. 154;
United States v. McCullagh, 221 Fed. 288.

"The act challenged is believed to be the single instance in the entire legislative or judicial history of this nation, or the composing states, in which a contrary view has been expressed. Unless a departure, as radical in theory as it is important in its effects, is to be made from fundamental principles long established by our laws, and long acquiesced in by our people, the act in question must be held incapable of support by any provision of the organic law of our country. If the act in question shall, on any ground, or for any reason, be upheld and enforced, it must surely follow that many laws of the separate states of this Union must hereafter be held inoperative, for there can be no divided authority of the nation and the several states over the single subject-matter in issue, with either safety to the nation or security to the citizen."

United States v. McCullagh, 221 Fed. 288, l. c. 294-295.

"..... If Congress has not the power, the duty of the court is to declare the act void. *The court is unable to find any provision in the Constitution authorizing Congress, either expressly or by necessary implication, to protect or regulate the shooting of migratory wild game when in a state,* and is therefore forced to the conclusion that the act is unconstitutional."

United States v. Shauver, 214 Fed. 154, 160.

VIII.

The fact that the present Act of Congress purports to give effect to a treaty between the United States and Great Britain cannot validate such Act of Congress when its effect is not only to accomplish that which under the Constitution Congress has no power to do, but also to do that which is forbidden to the entire Federal Government in all or any of its departments under the terms of the Constitution. Any and every treaty must be presumed to be made subject to the rightful powers of the governments concerned, and neither the treaty-making power alone, nor the treaty-making power in conjunction with any or all other departments of the Government, can bind the Government to do that which the Constitution forbids.

The Federalist, pp. 144-145, 215-216;
Works of Calhoun, Vol. I, 203-204, pp. 249-250, 252-253;
Geofroy v. Riggs, 133 U. S. 258, 267;
People v. Gerke, 5 Cal. 381, 382 et seq.;
Tucker on the Constitution, Vol. II, pp. 725, 726;
George v. Pierce, 148 N. Y. Supp. 230, 237;
Compagnie v. Board, 51 La. Ann. 645, 662; 186 U. S. 380;
Cantini v. Tillman, 54 Fed. 969;
Butler, Treaty Making Power, Vol. I, p. 64;
Loan Association v. Topeka, 20 Wall. 655, 662-663;
Story, Commentaries on the Constitution, Sec. 1508;
Duer, Lectures on the Constitutional Jurisprudence of the United States (2 Ed.), p. 228;
Colley, Principles of Constitutional Law, p. 117;
Von Holst, Constitutional Law of the United States, p. 202;
Thayer, Cases on Constitutional Law, Vol. I, p. 373;
59th Congress, 41 Congressional Record, Part I, p. 299;

William Archer Cocke's "Constitutional History of the United States," p. 235;
Jefferson, Manual of Parliamentary Practice, p. 110, note 3;
Elliot's Debates, Vol. III, pp. 504, 507;
Cherokee Tobacco Case, 11 Wall. 616, 20 L. Ed. 227;
Siemessen v. Bofer, 6 Cal. Rep., p. 250;
The People v. Naglee, 1 Cal. 246, 247;
8 Opinions of Attorney-Generals, 411-415;
Constitution of United States, Amendment X;
Kansas v. Colorado, 206 U. S. l. c. 80;
Murphy v. Ramsay, 114 U. S. 15, 44;
Head Money Cases, 112 U. S. 580;
Jones v. Meehan, 175 U. S. 132;
Fong Yue Ting, 149 U. S. 698;
Butler on Treaties, Vol. II, pp. 350, 352;
Seneca Nation v. Christie, 126 N. Y. 122;
Fort Leavenworth v. Lowe, 114 U. S. 525;
Pierce v. State, 13 N. H. 576;
Cooley, Constitutional Limitations (7 Ed.), p. 11;
Martin v. Hunter's Lessee, 1 Wheat. 304, 326;
Mormon Church v. United States, 136 U. S. 1;.

"A treaty cannot be made which alters the Constitution of the country, or which infringes any express exceptions to the power of the Constitution of the United States."

Hamilton's Works, Vol. IV, p. 342.

"If individuals enter into a state of society, the laws of that society must be the supreme regulator of their conduct. If a number of political societies enter into a larger political society, the laws which the latter may enact, pursuant to the powers entrusted to it by its constitution, must necessarily be supreme over those societies, and the individuals of whom they are composed. It would otherwise be a mere treaty, dependent on the good faith of the parties, and not a government; which is only another word for political power ans supremacy. But it will not follow from this doctrine, that acts of the larger

society, which are *not pursuant* to its constitutional powers, but which are invasions of the residuary authorities of the smaller societies, will become the supreme law of the land. These *will be merely acts of usurpation, and will deserve to be treated as such.*"

Alexander Hamilton, The Federalist, p. 145.

"It is sufficient, in reply, to state, that the clause is declaratory; that it vests no new power whatever in the government, or in any of its departments. Without it, the constitution and the laws made in pursuance of it, and the treaties made under its authority, would have been the supreme law of the land, as fully and perfectly as they now are; and the judges in every State would have been bound thereby, anything in the constitution or laws of a state to the contrary notwithstanding. Their supremacy results from the nature of the relation between the federal government, and those of the several States, and their respective constitutions and laws. Where two or more States form a common constitution and government, the authority of these, within the limits of the delegated powers, must, of necessity, be supreme, in reference to their respective separate constitutions and governments. Without this, there would be neither a common constitution and government, nor even a confederacy. The whole would be, in fact, a mere nullity. *But this supremacy is not an absolute supremacy. It is limited in extent and degree. It does not extend beyond the delegated powers;—all others being reserved to the states and the people of the States. Beyond these the Constitution is as destitute of authority, and as powerless as a blank piece of paper; and the measures of the government mere acts of assumption.* And, hence, the supremacy of laws and treaties is expressly restricted to such as are made in pursuance of the Constitution, or under the authority of the United States; which, can, in no case, extend beyond the delegated powers. There is, indeed, no power of the government without restriction; not even that which is called the discretionary power of Congress. I refer to the grant which authorizes it to pass laws to carry into effect the powers expressly vested in it,— or in the government of the United States,—or in any of its departments, or officers. This power,

comprehensive as it is, is, nevertheless, subject to two important restrictions; one, that the law must be necessary,—and the other, that it must be proper."

Works of Calhoun, pp. 252-253.

"The propriety of a law, in a constitutional light, must always be determined by the nature of the powers upon which it is founded. Suppose, by some forced construction of its authority, (which indeed cannot easily be imagined), the federal legislature should attempt to vary the law of descent in any state; would it not be evident, that in making such an attempt, it had exceeded its jurisdiction, and infringed upon that of the state? Suppose, again, that upon the pretense of an interference with its revenues, it should undertake to abrogate a land tax imposed by the authority of a state; would it not be equally evident that this was an invasion of that concurrent jurisdiction in respect to this species of tax, which the Constitution plainly supposes to exist in the state governments? If there ever should be a doubt on this head, the credit of it will be entirely due to those reasoners, who in the impudent zeal of their animosity to the plan of the convention, have labored to envelope it in a cloud, calculated to obscure the plainest and simplest truths."

Alexander Hamilton, The Federalist, pp. 144-145.

"The powers delegated by the proposed constitution to the federal government, are few and defined. Those which are to remain in the state governments, are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several states will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the state."

Mr. Madison, The Federalist, pp. 215-216.

"That her object was to guard against the abuse of construction, the act itself, on its face, and the discussions in her

convention, abundantly prove. It was done effectually, as far as it depended on words. It declares that all powers granted by the Constitution, are derived from the people of the United States; and may be *resumed* by them when *perverted* to their injury or oppression; and, that every power *not granted*, remains with them, and at their will; and that no right of any description can be canceled, abridged, restrained or modified by Congress, the Senate, the House of Representatives, the President, or any department, or officer of the United States. Language cannot be stronger. It guards the reserved powers against the government as a whole, and against all its departments and officers and in every mode by which they might be impaired; showing, clearly, that the intention was to place the reserved powers beyond the possible interference and control of the government of the United States." Works of Calhoun, pp. 249-250.

"The treaty power as expressed in the Constitution is in terms unlimited except by those restraints which are found in that instrument against the action of the Government, or of its department, and *those arising from the nature of the Government itself and of that of the states.* It would not be contended that it extends so far as to authorize what the Constitution forbids or a change in the character of the government or in that of one of the states, or a cession of any portion of the territory of the latter without its consent."

Geofroy v. Riggs, 133 U. S. 258, 267.

"The language which grants the power to make treaties, contains no words of limitation; it does not follow that the power is unlimited. It must be subject to the general rule, that an instrument is to be construed so as to reconcile and give meaning and effect to all its parts. If it were otherwise, the most important limitation upon the powers of the Federal Government would be ineffectual, and *the reserved rights of the state would be subverted.* This principle of construction as applied, not only in reference to the Constitution of the United States, but particularly in the relation of all the rest of it to the treaty making grant, was recognized both by Mr. Jefferson and John Adams,—two leaders of opposite schools

of construction. Jefferson's Works, Vol. 3, page 135; Vol. 6, page 560."

People v. Gerke, 5 Cal. 381, 382 et seq.

"A treaty, therefore, cannot take away essential liberties secured by the Constitution to the people. A treaty cannot bind the United States to do what their Constitition forbids them to do.

Tucker on the Constitution, Vol. II, p. 726.

"But if this treaty was an attempt to transfer from the people of the state to the people of the United States the fee and the right of pre-emption of the Onondago lands it would be in so far ineffective. A reasonable construction must be given to the Constitution, having regard to the circumstances under which it was formed and its purposes. The authority of the United States as to treaties is not unlimited. *It may not, under the guise of a treaty, deprive a state of those governmental powers which are a part of its inherent rights. It may not transfer its property. Geofroy v. Riggs*, 133 U. S. 258, 10 Sup. Ct. 295, 33 L. Ed. 642; *Provost v. Greenaux*, 19 How. 1, 15 L. Ed. 572; *Seneca Nation v. Christie*. 126 N. Y. 122-143, 27 N. E. 275."

George v. Pierce, 148 N. Y. Supp. 230, 237.

"The treaties and laws of the United States must be held to have been passed with reference to and subsidiary to, the rightful exercise of the police power by the different states, in aid of the protection and preservation of the public health within their respective borders."

Campagnie v. Board, 51 La. Ann., 645, 662, Affirmed; 186 U. S. 380.

"The police power is a right reserved by the states, and has not been delegated to the general government. In its lawful exercise, the states are absolutely sovereign. Such exercise cannot be affected by any treaty stipulations."

Cantini v. Tillman, 54 Fed. 969.

"Undoubtedly, as the Supreme Court asserted in Murphy v. Ramsey, 114 U. S. 15, complete and unlimited power is repugnant to our institutions, but it is also declared in Mormon Church v. U. S. 136 U. S. 1, that those limitations in many instances are found, not in the Constitution, but in the fundamental principles upon which our Government is established."

Butler, Treaty Making Power, Vol. I, p. 64.

"The theory of our governments, State and National, is opposed to the deposit of unlimited power anywhere. The executive, the legislative, and the judicial branches of these governments are all of limited and defined powers.

"There are limitations on such power which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name."

Loan Association v. Topeka, 20 Wall. 655, 662-663.

"The power 'to make treaties' is by the Constitution general; and of course it embraces all sorts of treaties, for peace or war; for commerce or territory; for alliances or succors; for indemnity for injuries or payment of debts; for the recognition and enforcement of principles of public law; and for any other purposes which the policy or interests of independent sovereigns may dictate in their intercourse with each other. *But though the power is thus general and unrestricted, it is not to be so construed as to destroy the fundamental laws of the state.* A power given by the Constitution can not be construed to authorize a destruction of other powers given in the same instrument. It must be construed, therefore, in subordination to it; and *cannot supersede or interfere with any other of its fundamental provisions.* Each is equally obligatory, and of paramount authority within its scope; and no one embraces a right to annihilate any other. A treaty to change the organization of the Government, or annihilate its sovereignty, to overturn its republican form, or to deprive it of its constitutional powers, would be void; because it would

destroy what it was designed merely to fulfill, the will of the people."

Story, Commentaries on the Constitution, Sec. 1508.

"And although the President and Senate are thus invested with this high and exclusive control over all those subjects of negotiation with foreign powers, which, in their consequence, may affect important domestic interests, yet it would have been impossible to have defined a power of this nature, and, therefore, general terms only were used. These general expressions, however, ought strictly to be confined to their legitimate signification; and in order to ascertain whether the execution of the treaty-making power can be supported in any given case, those principles of the Constitution, from which the power proceeds, should carefully be applied to it. The power must, indeed, be construed in subordination to the Constitution; and however, in its operation, it may qualify, it cannot supersede or interfere with any other of its fundamental provisions, nor can it ever be so interpretated as to destroy other powers granted by that instrument. A treaty to change the organization of the Government, or annihilate its sovereignty, or overturn its republican form, or to deprive it of any of its constitutional powers, would be void; because it would defeat the will of the people, which it was designed to fulfill."

Duer, Lectures on the Constitutional Jurisprudence of the United States (2nd Ed.), p. 228.

"The Constitution imposes no restrictions upon this power (treaty-making power), but it is subject to the implied restriction that nothing can be done under it which changes the Constitution of the country, or robs a department of the government or any of the states of its constitutional authority."

Cooley, Principles of Constitutional Law, p. 117.

"As to the extent of the treaty-power the Constitution says nothing, but it evidently cannot be unlimited. The power exists only under the Constitution, and every treaty

stipulation inconsistent with a provision of the constitution is therefore inadmissible and according to the constitutional law *ipso facto* null and void."

Von Holst, Constitutional Law of the United States, p. 202.

"It is certain that no authority granted by the constitution to any of the factors of government can be withdrawn from it by treaty. For that would be a change of the constitution and, as such, unconstitutional."

Von Holst, Constitutional Law of the United States, p. 202.

"A treaty, therefore, cannot take away essential liberties secured by the Constitution to the people. A treaty cannot bind the United States to do what their Constitution forbids them to do. We suggest a further limitation: A treaty cannot compel any department of the Government to do what the Constitution submits to its exclusive and absolute will. On these questions the true canon of construction, that the treaty-making power, in its seeming absoluteness and unconditional extent, is confronted with equally absolute and unconditioned authority vested in the judiciary."

Tucker, Constitution, Vol. II, p. 725.

"The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and of that of the States. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States, or a cession of any portion of the territory of the latter, without its consent. Fort Leavenworth Railroad Co. v. Lowe, 114 U. S. 525, 541."

Thayer, Cases on Constitutional Law, Vol. I, p. 373.

"I plant myself firmly and unalterably upon the proposition that we can make no treaty that violates any of the provisions of the Constitution of the United States, that the treaty-making power in the sixth Article must be construed *in pari materia* with all the other provisions contained in the Constitution, and if the treaty comes in conflict with any of the limitations of the instrument the treaty must yield and the Constitution prevail.

"As a corollary of this proposition I plant myself upon the doctrine that any treaty that violates Article X of the Constitution and infringes upon the reserved rights of the States which have not been delegated to the General Government, and embraces subjects that belong to the States, and that are not necessary to carry out the purposes of the Government as defined in the Constitution, is *ultra vires* and not within the capacity of the Government to make."

Senator Rayner, 59th Congress, 41 Congressional Record, Part 1, p. 299.

"I do not say that there is no check or restriction upon the functions of the Government, for there is this limit, that it cannot be exercised in the destruction of or in opposition to any known Constitutional right or power, and must be subordinate to every other right recognized."

William Archer Cocke's "Constitutional History of the United States," p. 235.

"*It must have meant to except out of these the rights reserved to the states*, for surely the President and Senate cannot do by treaty what the whole Government is interdicted from doing in any way."

Jefferson, Manual of Parliamentary Practice, p. 110, note 3.

"The honorable gentleman says that, if you place treaties on the same footing here as they are in England, he will consent to the power, because the king is restrained in making treaties. Will not the President and Senate be restrained? Being creatures of that Constitution, can they destroy it? Can

any particular body, instituted for a particular purpose, destroy the existence of the society for whose benefit it is created? It is said there is no limitation of treaties. I defy the wisdom of that gentleman to show how they ought to be limited. When the Constitution marks out the powers to be exercised by particular departments, I say no innovation can take place. An honorable gentleman says that this is the Great Charter of America. If so, will not the last clause of the 4th Article of the Constitution secure against dismembership? It provides that 'nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular State.' And if this did not constitute security, it follows, from the nature of civil association, that no particular part shall sacrifice the whole.

Governor Randolph in Virginia Convention.
Elliott's Debates, Vol. III, p. 504.

"The worthy Member says that they can make a treaty relinquishing our rights and inflicting punishments; because all the treaties are declared paramount to the constitutions and laws of the States. An attentive consideration of this will show the committee that they can do no such thing. The provision of the 6th article is, that this Constitution, and the laws of the United States which shall be made in pursuance thereof, and all the treaties made, or which shall be made, under the authority of the United States shall be the supreme law of the land. They can, by this, make no treaty which shall be repugnant to the spirit of the Constitution, or inconsistent with the delegated powers. The treaties they make must be under the authority of the United States, to be within their province. It is sufficiently secured, because it only declares that, in pursuance of the powers given, they shall be the supreme law of the land, notwithstanding anything in the constitution or laws of the particular states."

George Nicholas in Virginia Convention.
Elliott's Debates, Vol. III, p. 507.

"It need hardly be said that a treaty cannot change the Constitution or be held valid if it be in violation of that instru-

ment. This results from the nature and fundamental principles of our government."

Cherokee Tobacco Case, 11 Wall. 616, 20 L. Ed. 227.

"In my opinion, the treaty-making power can only be coeval with the express grant of power to the Federal Government, and can never be extended, by implication, to the reserved powers of the States, or matters which belong to State sovereignty, or the right which appertains to each State to govern her own domestic concerns, and establish her own police regulations; neither can the exercise of this power, on the part of the President and Senate, be extended to matters which are the proper subject of congressional legislation; 'for it would,' as Mr. Jefferson truly remarks in his letter to Mr. Monroe, in 1796, upon the subject of the British treaty, 'be virtually transferring the powers of legislation from the President, Senate and House of Representatives to the President, Senate and Piamingo, and any other Indian, Algerine or other chief.' "

Siemssen v. Bofer, 8 Cal. Rep., p. 250.

"But even if the provisions of the statute did clash with the stipulations of that, or of any other treaty, the conclusion is not deducible that the treaty must, therefore, stand, and the state law give way. The question in such case would not be solely what is provided for by the treaty, but whe ther the state retained the power to enact the contested law, or had given up that power to the general government. *If the state retains the power, then the president and senate cannot take it away by a treaty.* A treaty is supreme only when it is made in pursuance of that authority which has been conferred upon the treaty-making department, and in relation to those subjects the jurisdiction over which has been exclusively entrusted to Congress. When it transcends these limits, like an act of Congress which transcends the constitutional authority of that body, it cannot supersede a state law which enforces or exercises any power of the state not granted away by the constitution. To hold any other doctrine than this

would, if carried out into its ultimate and possible consequences, sanction the supremacy of a treaty which should entirely exempt foreigners from taxation by the respective states, or which should even undertake to cede away a part or the whole of the acknowledged territory of one of the states to a foreign nation.....

"It is not within the scope of a constitutional treaty to interfere with the reserved powers of taxation and of control over foreigners, which we have above discussed. No treaty, within our knowledge, has attempted to do it; and if such attempt should be made, the stipulation would, we apprehend, be neither recognized nor enforced by the supreme tribunal of the nation....."

The people v. Naglee, 1 Cal. 246, pp. 246, 247.

In the consideration of the questions involving the powers of the Federal and State governments there exists the mental temptation to lodge all sovereign or governmental power in either the United States or the States. This disposition is evidenced by the frequent statement that there exists in this country *dual* sovereignties. All who reason thus, it seems to us, fall into error.

Judge Treiber of the District Court of Arkansas, in upholding the constitutionality of the Migratory Bird Law, in the case of United States vs. Thompson, quoted from an opinion of Attorney-General Cushing (8 Opinions of Attorney-Generals, 411-415), as follows:

> "The power which the Constitution bestows on the President, with the advice and consent of the Senate, to make treaties is not only general in terms, and without any express limitations, but it is accompanied with absolute prohibition of the exercise of the treaty power by the states—that is, in the matter of foreign negotiation the states have conferred the whole of their power, in other words, all the treaty powers of sovereignty, on the United States. Thus, in the present case, if the power of negotiation be not in the United States, then it exists nowhere, and

> one great field of international relation of negotiation and of ordinary public and private interest is closed up, as well against the United States as each and every one of the states. That is not a supposition to be accepted, unless it be forced upon us by considerations of overpowering cogency. Nay, it involves political impossibility. For, if one of the proper functions of sovereignty be thus utterly lost to us, then the people of the United States are but incompletely sovereign—not sovereign—nor in coequality of right with other admitted sovereignties of Europe and America."

The foregoing is a fair sample of the erroneous logic of those who contend that the Constitution creates an unlimited treaty-making power. Sovereign power is absolute, unrestricted power. There is nothing a sovereign may not do. The *people* of the United States are a sovereign people, but in a strict sense the United States is not a sovereign government, nor do the states possess sovereign powers. There exist sovereign powers which are not delegated to Federal authority, but the exercise of which likewise is prohibited to the states.

By the Tenth Amendment to the Constitution there is distinctly created *three* repositories of power. With more propriety it can be said that there exists in this Nation a *triple* sovereignty, than to say that there exists a *dual* sovereignty. It requires but cursory scrutiny of the Tenth Amendment to demonstrate the conclusive truth of the assertion that our Constitution creates three repositories of power. Amendment Ten reads:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

In so many words this provision recognizes that there are powers not delegated to the United States, but the exercise of which is prohibited to the States. The people of the United States possess sovereign power. Some of that power

has been delegated to the Federal Government. Some has been delegated or reserved to the States; there remains undisposed of power which is reserved "to the people" by the express terms of the Tenth Amendment. That up to this time the people have not created an agency by which to exercise a power which may not now be exercised by either the Federal or the State governments, does not militate against the soundness of our contention.

Mr. Justice Brewer, in the case of *Kansas vs. Colorado*, 206 U. S., recognized the existence of the three repositories of power in the following language (l. c. 90):

> "But the proposition that there are legislative powers affecting the nation as a whole which belong to, although not expressed in the grant of powers, is in direct conflict with the doctrine that this is a government of enumerated powers. That this is such a government clearly appears from the Constitution, independently of the Amendments, for otherwise there would be an instrument granting certain specified things made operative to grant other and distinct things. This natural construction of the original body of the Constitution is made absolutely certain by the 10th Amendment. This Amendment, which was seemingly adopted with prescience of just such contention as the present, disclosed the widespread fear that the national government might, under the pressure of a supposed general welfare, attempt to exercise powers which had not been granted. With equal determination the framers intended that no such assumption should ever find justification in the organic act, and that if, in the future, further powers seemed necessary, they should be granted by the people in the manner they had provided for amending that act. It reads: 'The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.' The argument of counsel ignores the principal factor in this article, to-wit, 'the people.' Its principal

purpose was not the distribution of power between the United States and the States, but a reservation to the people of all powers not granted. The preamble of the Constitution declares who framed it,—'we, the people of the United States,' not the people of one, state, but the people of all the states; and Article X reserves to the people of all the states the powers not delegated to the United States. The powers affecting the internal affairs of the states not granted to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, and all powers of a national character which are not delegated to the national government by the Constitution are reserved to the people of the United States. The people who adopted the Constitution knew that in the nature of things they could not foresee all the questions which might arise in the future, all the circumstances which might call for the exercise of further national powers than those granted to the United States, and, after making provision for an amendment to the Constitution by which any needed additional powers would be granted, they reserved to themselves all powers not so delegated. This Article X is not to be shorn of its meaning by any narrow or technical construction, but is to be considered fairly and liberally so as to give effect to its scope and meaning."

It may be conceded that it is an attribute of complete sovereignty to make a Migratory Bird Treaty, but it is a power reserved "to the people" and not delegated to the United States.

Recent events of the gravest importance furnish illustrations of the correctness of our position. That a full sovereign nation could enter into a treaty obligating itself to send troops on the call of an association of powers cannot be questioned, and yet, it is conceded by the most distinguished advocates of the League of Nations covenant that Article X imposes no *legal* obligation upon the United States to send

troops in such a situation, because such course would be an impingement upon the Constitutional prerogatives of the Congress. The power to make such a treaty, therefore, legally binding is reserved "to the people."

The possession of sovereign power by the United States would no doubt enable it to make a treaty with Japan relative to the admission of Japanese children in the schools of California. The recent controversy with Japan over that question may be summarized thus: Japan said to America that she would like to make a treaty admitting Japanese children to the schools of California. The United States replied, "That is a matter beyond national jurisdiction. The State of California alone controls its schools." Whereupon, Japan replied, "We will then make a treaty with California." To this our Government answered, "The Constitution of the United States prohibits California from making any treaty."

Where is a sovereign power of this kind lodged? The answer is, "In the people."

Applying the foregoing principle to the subject matter of the case at bar we find that the power to control migratory birds is lodged in the states. Many former decisions of this Court are to that plain effect. This is an exclusion of the exercise of any such power by the Federal Government. As the States may not make a treaty with respect to the matter, it follows that the power to make such a treaty is reserved not to the Federal Government, but "to the people," and only by amendment to the Constitution can such "reserved powers be taken from the people and lodged in the Federal Government.

IX.

The Federal Government is a government not only of enumerated powers, but it is also a government to which certain powers are denied. Powers denied are not to be implied: they are to be obtained, if obtained at all, from, and in the manner provided by, those who originally granted

the enumerated powers, but who at the same time denied other powers—the people.

Amendments to the Constitution, Arts. I to X, inclusive;
Barron v. Baltimore, 7 Pet. 243, 247;
Kansas v. Colorado, 206 U. S. 46, 89-90;
United States v. Shauver, 214 Fed. 154, 156;
Holden v. Joy, 17 Wallace, 243;
United States v. Rhodes, 1 Abb. U. S. Rep. 43; Fed. Cases, 16151;
Fairbank v. United States, 181 U. S. 283, 288.

"But the proposition that there are legislative powers affecting the Nation as a whole which belong to, although not expressed in, the grant of powers, is in direct conflict with the doctrine that this is a government of enumerated powers. That this is such a government clearly appears from the Constitution, independently of the Amendments, for otherwise there would be an instrument granting certain specified things made operative to grant other and distinct things. This natural construction of the original body of the Constitution is made absolutely certain by the 10th amendment. This amendment, which was seemingly adopted with prescience of just such contention as the present, disclosed the widespread fear that the National Government might, under the pressure of a supposed general welfare, attempt to exercise powers which had not been granted. With equal determination the framers intended that no such assumption should ever find justification in the organic act, and that if, in the future, further powers seemed necessary, they should be granted by the people in the manner they had provided for amending that act."

Kansas v. Colorado, 206 U. S. 46, 89-90.

"We are not here confronted with a question of the extent of the powers of Congress, but one of the limitations impose by the Constitution on its action, and it seems to us clear that the same rule and spirit of construction must also be recognized. If powers granted are to be taken as broadly

granted and as carrying with them authority to pass those acts which may be reasonably necessary to carry them into full execution; in other words, if the Constitution in its grant of powers is to be so construed that Congress shall be able to carry into full effect the powers granted, it is equally imperative that, where prohibition is placed upon the power of Congress, that prohibition or limitation should be enforced in its spirit and to its entirety. It would be a strange rule of construction that language granting powers is to be liberally construed, and that language of restriction is to be narrowly and technically construed."

Fairbank v. United States, 181 U. S. 283, 288.

"The constitution was ordained and established by the people of the United States for themselves, for their own government and not for the government of the individual states. Each state established a constitution for itself, and, in that constitution, provided such limitations and restrictions on the powers of its particular government as its judgment dictated. The people of the United States framed such a government for the United States as they supposed best adapted to their situation, and best calculated to promote their interests. The powers they conferred on this government were to be exercised by itself; and the limitations on power, if expressed in general terms, are naturally, and we think, *necessarily applicable to the government created by the instrument.* They are limitations of power granted in the instrument itself; not of distinct governments, framed by different persons and for different purposes."

Barron v. Baltimore, 32 U. S. 243, 247.

"That the framers of the Constitution intended that it should extend to all those objects which in the intercourse of nations had usually been regarded as the proper subjects of negotiation and treaty, is not inconsistent with the nature of our government and *the relation between the States and the United States.*"

Holden v. Joy, 17 Wallace, 243, 21 L. Ed. 523.

"What is unwarranted or forbidden by the Constitution can no more bedone in one way that in another. The authority of the national government is limited, though supreme in the sphere of its operation. As compared with the State governments, the subjects upon which it operates are few in number. Its objects are all national. It is one wholly of delegated powers. The States possess all which they have not surrendered; the government of the Union only such as the Constitution has given to it, expressly or incidentally, and by reasonable intendment. Whenever an act of that government is challenged a grant of power must be shown, or the act is void."

United States v. Rhodes, 1 Abb. U. S. Rep. 43, 44; Fed. Cases 16151.

"It is also claimed that it is one of those implied attributes of sovereignty in which the national government has concurrent jurisdiction with the states; that it is a dormant right in the national government; and, where the state is clearly incompetent to save itself, the national government has the right to aid. To sustain the latter proposition stress is laid on the fact that it is impossible for any state to enact laws for the protection of migratory wild game, and only the national government can do it with any fair degree of success; consequently the power must be national and vested in the Congress of the United States. A similar argument was presented to the court in Kansas v. Colorado, 206 U. S. 46, 89, 27 Sup. Ct. 655, 664 (51 L. Ed. 956), but held untenable."

United States v. Shauver, 214 Fed. 154, 156-157.

"4th. No legislation can be proper which is inconsistent with the letter and spirit of the Constitution; hence the trial and conviction of Milligan to death by court-martial, though claimed to be a means for the preservation of the Union, was held unconstitutional, because such trial and conviction were forbidden by the Constitution; and where, taking the whole Constitution in its distribution of powers between the departments of government, and the relation it establishes between the granted powers to the Federal government and the re-

served powers to the States, the act is not in accord with the whole scheme, but inconsistent with it—it is unconstitutional.

"5th. If Congressional legislation be inconsistent with the reserved rights of the States and their autonomy, it is unconstitutional.

"6th. If legislation be contrary to the trust nature of the power of Congress—that is, to the duty which Congress owes in respect to the subject-matter of the legislation to all the States, or to any of them—it would be contrary to the letter and spirit of the Constitution."

Tucker on the Constitution, Vol. I, pp. 371-373.

". . . . . *The right of local self-government as known to our system as a constitutional franchise* belongs, under the Constitution, *to the States and to the people thereof*, by whom that Constitution was ordained and to whom, by its terms, all power not conferred by it upon the Government of the United States *was expressly reserved.*"

Murphy v. Ramsey, 114 U. S. 15, 44.

If Congress, without an amendment to the Constitution, can take away from the states their control over wild game by means of a treaty, why cannot it in the same manner take away from the states their control over intoxicating liquors? Why amend the Constitution to have National prohibition instead of making a treaty to that end with Turkey or some other foreign power? Now that there is a prohibition amendment to the Constitution, why not disregard it and by means of a treaty with England—whom rumor says is not overly pleased with our aridity—provide for the sale of intoxicants in each and every state of the Union?

Why resort to the expensive and time-taking method of amendment to the Constitution in any instance if the assent of the people is not necessary in those things which affect so intimately their private lives, but may be taken from them by agreement with some foreign power? In the language of the Chief Justice of the United States:

"I cannot conceive how it can be held that pledges made to an alien people can be treated as more sacred than is that great pledge given by every department of the government of the United States to support and defend the Constitution."

Downes v. Bidwell, 182 U. S. 344, 45 L. Ed. 1088.

X.

Among those powers denied to the Federal Government until secured by amendment are those which are "reserved" to the states respectively or to the people. These reserved powers include those purely internal affairs which "concern the lives, liberties and properties of the people and the internal order, improvement and prosperity of the state." Without exception wild game has been held to be a part of this mass which is within the exclusive and absolute power of the state. When the power of the states over their purely internal affairs is destroyed, the system of government devised by the Constitution is destroyed.

Downes v. Bidwell, 182 U. S. 244, 312-313, 369-370;
Pierce v. State, 13 N. H. 536, 576, 578;
Hammer v. Dagenhart, 247 U. S. 251;
South Carolina v. United States, 199 U. S. 447, 451;
Collector v. Day, 11 Wall. 125, 127;
Tucker, Limitations on Treaty-making Power, 92, 93, 129-130;
Geofroy v. Riggs, 133 U. S. 258, 267;
George v. Pierce, 148 N. Y. 230, 237;
Tucker on the Constitution, Vol. II, pp. 726, 727;
Federalist, p. 145;
People v. Gerke, 5 Cal. 381, 382, et seq.

"The treaty power as expressed in the Constitution is in terms unlimited except by those restraints which are found in that instrument against the action of the Government, or of its department, and those arising from the nature of the Government itself and *that of the states.* It would not be contended

that it extends so far as to authorize what the Constitution forbids or a change in the character of the government *or in that of one of the states*, or a cession of any portion of the territory of the latter without its consent."

Geofroy v. Riggs, 133 U. S. 258, 267.

"If the treaty-making power can absolutely, without the consent of Congress, incorporate territory, and if that power may not insert conditions against incorporation, it must follow that the treaty-making power is endowed by the Constitution with the most unlimited right, susceptible of destroying every other provision of the Constitution; that is, it may wreck our institutions . . . . . The treaty-making power then, under this contention, instead of having the symmetrical functions which belong to it from its very nature, becomes distorted—vested with the right to destroy upon the one hand and deprived of all power to protect the government on the other."

Downes v. Bidwell, 182 U. S. 244, 312, 313.

The above was written by Mr. Justice White, now Mr. Chief Justice. Mr. Chief Justice Fuller did not agree with the conclusion reached in that case, and wrote a dissenting opinion; but in this dissenting opinion he expresses his agreement with Mr. Justice White upon this particular point as follows:

> "The grant by Spain could not enlarge the powers of Congress, nor did it purport to secure from the United States a guaranty of civil or political privileges.
>
> "*Indeed a treaty which undertook to take away what the Constitution secured or to enlarge the Federal jurisdiction would be simply void.*
>
> "'It need hardly be said that a treaty cannot change the Constitution or be held valid if it be in violation of that instrument. *This results from the nature and fundamental principles of our government.*' *The Cherokee Tobacco*, 11 Wall. 616, 620."

Downes v. Bidwell, 182 U. S. 244, 369-370.

"In our view the necessary effect of this Act is, by means of a prohibition against the movement in interstate commerce of ordinary commercial commodities, to regulate the hours of labor of children in factories and mines within the states, a purely state authority. Thus the Act in a two-fold sense is repugnant to the Constitution. *It not only transcends the authority delegated to Congress over commerce, but also exerts a power as to a purely local matter to which the federal authority does not extend.* The far-reaching result of upholding the Act cannot be more plainly indicated than by pointing out that if Congress can thus regulate matters entrusted to local authority by prohibition of the movement of commodities in interstate commerce, all freedom of commerce will be at an end, and the *power of states over local matters may be eliminated, and thus our system of government be practically destroyed.*"

Hammer v. Dagenhart, 247 U. S. 251 (38 Sup. Ct. Rep. 529.)

"As a police regulation, relating exclusively to the internal trade of the states, it can only have effect where the legislative authority of Congress excludes, territorially all state, legislation, as, for example, in the District of Columbia. *Within state limits, it can have no constitutional operation.* This has been so frequently declared by this court, results so obviously from the terms of the Constitution, and has been so fully explained and supported on former occasions (License cases, 5 How. 504; Passenger cases, 7 How. 283; License tax cases, 5 Wall. 470 (72 U. S. XVIII, 500,) and the cases cited) that we think it unnecessary to enter again upon the discussion.

U. S. v. DeWitt, 9 Wall. 41, 45 (19 L. Ed. 593.)

"It was held that a law of Pennsylvania making it unlawful for unnaturalized foreign born residents to kill game, and to that end making the possession of shotguns and rifles unlawful, did not violate the treaty. Adopting the declaration of the court below, it was said 'that the equality of rights that the treaty assures is equality only in respect of protection and security for persons and property.' And the ruling *was given point by a citation of the power of the state over its wild*

game, which might be preserved for its own citizens. In other words, the ruling was given point by *the special power of the state over the subject matter*—a power which exists in the case at bar, as we have seen."

Heim v. McCall, 239 U. S. 175, 194.

"The discrimination defined by the act does not pertain to the regulation or distribution of the public domain, or of the common property or resources of the people of the state, *the enjoyment of which may be limited to its citizens as against both aliens and the citizens of other states.* Thus in McCready v. Virginia, 94 U. S. 391, 396 (24 L. Ed. 248, 249), the restriction to the citizens of Virginia of the right to plant oysters in one of its rivers was sustained upon the ground that the regulations related to the common property of the citizens of the state, and an analogous principle was involved in Patsone v. Pennsylvania, 232 U. S. 138, 145, 146, 58 L. Ed. 539, 544, (34 Sup. Ct. Rep. 281), where the discrimination against aliens upheld by the court had for its object the protection of wild game within the states, with respect to which it was said that the state could exercise its preserving power for the benefit of its own citizens if it pleased."

Truax v. Raich, 239 U. S. 33.

". . . . . a **sovereign state**, *a necessary incident of whose authority was the complete power to regulate the killing of game within its borders.*"

Ward v. Race Horse, 163 U. S. 504, l. c. 510.

"Wyoming, then, will have been admitted into the Union, not as an equal member, but as one shorn of a legislative power vested in all the other states of the Union, *a power resulting from the fact of statehood and incident to its plenary existence.*"

Ward v. Race Horse, 163 U. S. 504, l. c. 514.

". . . . . The proposition that the State may not forbid carrying it beyond her limits involves, therefore, the contention that a State cannot allow its own people the en-

joyment of the benefits *of the property belonging to them* in common, without at the same time permitting the citizens of other States to participate in that *which they do not own. . . . . The common ownership imports the right to keep the property, if the sovereign so chooses, always within its jurisdiction for every purpose. . . .*"

Geer v. Connecticut, 161 U. S. 519, l. c. 529-530.

"The several states, as has been seen, possess the most absolute and plenary power of control over the subject-matter of wild animal and wild bird life with their territorial domains it is possible to either conceive or to grant."

United States v. McCullagh, 221 U. S. 288, 295, 296.

"Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health, and property of the citizens, and to the preservation of good order and the public morals. *The legislature cannot, by any contract, divest itself of the power to provide for these objects.* They belong emphatically to that class of objects which demand the application of the maxim *salus populi suprema lex;* and they are to be attained and provided for by such appropriate means as the legislative discretion may devise. *That discretion can no more be bargained away than the power itself.*"

Beer Co. v. Massachusetts, 97 U. S. 32, 33; 24 L. Ed. 989.

"*In re* Rahrer, 140 U. S. 554, the Supreme Court of the United States, speaking through Chief Justice Fuller, made use of the following language: 'The power of the State to impose restraints and burdens upon persons and property in conservation and promotion of the public health, good order, and prosperity, is a power originally and always belonging to the States, not surrendered by them to the general government, nor directly restrained by the Constitution of the United States, and essentially exclusive.

" 'And this court has uniformly recognized State legislation, legitimately, for police purposes, as not in the sense of the Constititution infringing upon any right which has been confided, expressly or by implication, to the general government. . . .'

"*The treaties and laws of the United States must be held to have been passed with reference to and subsidiary to the rightful exercise of the police power by the different States,* in aid of the protection and preservation of the public health within their respective borders."

Compagnie v. Board, 51 La. Ann. 645, 660-662. Affirmed: 186 U. S. 380.

"In the American constitutional system, the power to establish the ordinary regulations of police has been left with the individual States, and it cannot be taken from them, either wholly or in part, and exercised under legislation of Congress. *Neither can the national government, through any of its departments or officers, assume any supervision of the police regulations of the States.*"

Cooley, Constitutional Limitations (7 Ed.), p. 831.

"Call them by whatever name, if they are necessary to the well-being and independence of all communities, *they remain among the reserved rights of the States,* no express grant of them to the general government having been either proper, or apparently embraced in the Constitution."

License Cases, 5 How. 627; 12 L. Ed. 312.

"We cannot doubt that the police power of the State was applicable and adequate to give an effectual remedy. *That power belonged to the States when the Federal Constitution was adopted. They did not surrender it, and they all have it now.* It extends to the entire property and business within their local jurisdiction. Both are subject to it in all proper cases."

The Northwestern Fertilizing Co. v. Hyde Park, 97 U. S. 659; 24 L. Ed. 1036.

"On the other hand, the power to regulate the internal police of the state, which is lodged in, and guaranteed to the state authority, has for its objects, the inhabitants and residents of the state, considered as such (notwithstanding they at the same time owe duties to the United States, and are under obligations as citizens of that government), and all the property within its limits which may fairly be regarded as a part of the mass of property in the state."

Pierce v. State, 13 N. H. 536, l. c. 578.

"The power then of New York to pass this law having undeniably existed at the formation of the Constitution, the simple inquiry is, whether by that instrument it was taken from the states, and granted to Congress; for if it were not, it yet remains with them.

"If, as we think, it be a regulation, not of commerce, but police; then *it is not taken from the states.*"

City of New York v. Miln, 11 Peters 102, 132-133.

" 'This police power of the State,' says another eminent judge, 'extends to thjprotection of the lives, health, comfort, and quiet of all persons, and the protection of all property within the State. . . . . .' (By this) 'general police power of the State, persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health and prosperity of the State; of the perfect right in the legislature to do which, no question ever was, or, upon the acknowledged general principles, ever can be made, so far as natural persons are concerned.' Thorpe v. Rutland, 27 Vt. 140, 149. *And neither the power itself, nor the discretion to exercise it as need may require, can be bargained away by the State.* Beer Company v. Massachusetts, 97 U. S. 25, 33."

Cooley's Constitutional Limitations, 7 Ed., pp. 830-831.

"Among those matters which are implied, though not expressed, is that *the Nation may not*, in the exercise of its

powers, *prevent a State from discharging the ordinary function of government*, just as it follows from the second clause of Article VI of the Constitution, that no State can interfere with the free and unembarrassed exercise by the National Government of all the powers conferred upon it."

South Carolina v. United States, 199 U. S. 447, 451; 50 L. Ed. 261.

". . . . .; for, *in this respect*, that is, in respect to the reserved powers, the *State is as sovereign and independent as the general government.*"

Collector v. Day, 11 Wall. 125, 127; 20 L. Ed. 122.

"It is a plain case of a subordinate overruling his superior, of the creature being superior to the creator. Every reputable commentator upon the Constitution from Story down to the present day, has held that the legislative powers of Congress lie in grant and are limited by such grant. This statement in effect declared that when a treaty that may need legislation to carry it into effect, has embraced a subject which Congress cannot legislate upon, because not granted the power under the Constitution, that the *treaty power may come to its own assistance and grant such right to Congress, though the Constitution, the creator of both, has denied it.* Such interpretation would clothe Congress with powers beyond the limits of the Constitution, with no limitations except the uncontrolled greed or ambition of an unlimited power."

Tucker, Limitations Treaty-making Power, pp. 129, 130.

"If we are to accept, therefore, the literal meaning of the words in Article VI, as applied to treaties, and give to them the supremacy which it is claimed the letter of the Constitution accords them, what is the result? In the first place, every power delegated to the Congress of the United States for its execution may be surrendered to the treaty power. The, purpose which the framers of the Constitution had that the imposition of taxes, the regulation of commerce, the establishment of postoffices and post-roads, the coining of

money, the naturalization of foreigners, and the like, should be accomplished only through the action of representatives elected by the people of the States, and the Senators representing the States, is abandoned and the powers are surrendered to the President and the Senate in the making of treaties with foreign countries; in the second place, after providing, as was their intention, for a republican form of Government, it must be presumed they deliberately inserted Article VI to change that form to the government of an oligarchy; and, thirdly, that after they had determined in their wisdom to concede to Congress powers of legislation in certain particulars, and that all else was to be left with the States or to the people, who were supposed to know better than anyone else, what was best for them in their respective localities, they deliberately reversed their action and inserted this article, which might exclude their representatives in Congress from a voice in any legislation, and give to the President and the Senate the power to uproot and destroy what had already been conceded to Congress and the States. And all this results, it is claimed, because the word 'Treaty' may embrace any subject that pertains to the people as citizens of the Stat ore Nation.

"St. George Tucker, Story, Rawle, Willoughby, Pomeroy, and Cooley, and every reputable writer upon the Constitution, declare that the treaty-power can do nothing which tends to destroy the Constitution itself. *Can it be doubted that the power to take away the right of Congress to legislate, or the right of the people of the States to regulate their own local affairs is the power to destroy the basic principles of the Constitution of our country?*"

Tucker, Limitations on Treaty-making Power, pp. 92, 93.

If the Federal authorities, by means of a treaty with some foreign government, could acquire and exercise the powers reserved to the states and denied to Federal authorities under the Constitution, the logical and inevitable result would be anomalous. The President and Senate could by treaty with some foreign power control the laws of a state relating to in-

spection, quarantine, health and internal trade; they could prescribe the times and modes of elections, and force the introduction and sale of opium, intoxicating liquors or any other substance, however injurious to the health and well-being of a state; they could cede to a foreign power a state or any part of its territory, and destroy the securities of liberty and property as effectually as the most despotic government ever formed.

But this is not all. If the treaty-making power is not within the constitutional limitations relating to the powers reserved to the states, it is not limited by any restriction of the Constitution. The Federal Government itself, as well as the several states, would be at the mercy of the President and the Senate. They could regulate foreign commerce in spite of the fact that Congress is expressly authorized to control the same. They could provide for duty rates upon articles imported from foreign nations, or admit them free of duty, although Congress has express authority to lay and collect taxes and duties. They could appropriate directly from the public treasury the public moneys in the face of the express power of Congress to originate all such appropriations. They could dispose of any part of the territory of the United States, or any of their property, without the consent of Congress, which alone has power to dispose of and make rules and regulations of the property of the United States. *In short, the Federal Government would be a government of men, and not of laws.* The question is not whether or not they will do these things but whether or not, under our form of government, they have the power.

XI.

Those who maintain that the reserved powers of the states are subject to treaties and may be taken from the states respectively, or the people, by means of a convention with some foreign power, rest their position upon the assertion that "a treaty is *the supreme law of the land.*" If a treaty be the supreme law of the land, it has become so by *construction*, for the Constitution as ratified by the people made the supreme law of the land to consist of three things:

1st—The Constitution; 2nd—the laws of the United States which shall be made in pursuance thereof; 3rd—all treaties made or which shall be made *under the authority of the United States.* **The Constitution is the God-head of this trinity. It yields to neither law nor treaty, nor anything else save and alone the sovereign will of its creator—the people. The powers reserved to the states respectively or to the people are, under this Constitution as sacred as the power to make treaties. Are they not even more so since they are the object of** *specific reservation* **and necessarily limit or restrict the** *general grant* **of power made to the treaty-making department of the government?**

Hamilton's Works, Vol. IV, p. 342;
Cooley, The Forum, June, 1893, p. 397;
Von Holst, Const. Law of United States, p. 202;
Duer, Lectures on the Constitution Jurisprudence of the United States, (2 Ed.) p. 228.
Tucker, Limitations, Treaty-making Power, pp. 128-129, 135-136, 139, 93-94, 86-87;
Judge Shackleford Miller, quoted in Tucker, Limitations, Treaty-making Power, pp. 21, 22;
The People v. Naglee, 1 Cal. 246, 247;
59th Congress, 41 Congressional Record, Part 1, p. 299;
William Archer Cocke, Constitutional History of the United States, p. 235;
Mr. Marcy, Moore's Int. Law Dig., Vol. V, p. 168;
Compagnie v. Board, 51 La. Ann. 645; 186 U. S. 380; affirmed: 186 U. S. 380.
Butler Treaty-Making Power, Vo. I, p. 63, Sec. 37, and note.
Benjamin Harrison, North American Review, January, 1901, p. 110;
Story's Commentaries on the Constitution, 5 Ed., pp. 217-220;
Thorp, Constitutional History, Vol. 2, Chap. 6, p. 199;
Loan Association v. Topeka, 20 Wall. 655, 662-663;

Jefferson, Manual of Parliamentary Practice, p. 110, note 3.
4 Elliott's Debates, p. 464;
Geofroy v. Riggs, 133 U. S. 266, 267.

"A treaty cannot be made which alters the Constitution of the country, or *which infringes any express exceptions to the power of the Constitution of the United States.*"

Hamilton's Works, Vol. IV, p. 342.

"When a treaty is said to be the supreme law, it is nevertheless to be understood that the Constitution, which is the highest expression of sovereign will and the authoritative representative of sovereign power in the nation, in fixing limitations upon the exercise of authority under it in regard to the subjects above indicated and many others, *restrains the treaty-making power quite as much as any other.* If it did not, and any treaty entered into in due form was in itself necessarily supreme law, a State might possibly by the force of it be set off from the Union to another nation, or the government might gradually and imperceptibly be overturned through a line of precedents constituting what at the time were perhaps not seen to be encroachments."

Cooley, the Forum, June 1893, p. 397.

"If, therefore, the supremacy of a treaty depends upon this Article, we have the right to conclude that since the supremacy accorded treaties made under the authority of the United States is the same as that accorded the laws of Congress, no greater supremacy should be accorded the one than the other, for the grant of supremacy to each is exactly the same, and if the one (the law of Congress) must conform to the Constitution, surely the other must do likewise. If the one cannot legislate on local affairs within the States because it would be unconstitutional, the other cannot barter or trade them in agreements with foreign countries for the same reason."

Tucker, Lim. Treaty-Making Power, p. 139.

"In defense of the claim of unlimited power to make treaties on all subjects by the United States with other countries, it is often recorded with pride that no treaty ever entered into by the United States has been set aside and declared null and void by the Supreme Court of the United States. This, if true, is indeed a subject upon which we have a right to congratulate ourselves and the country; for while we do not impugn the patriotism of the President, or the wisdom of the Senate, nor indeed the desire of each in the discharge of their duties under the treaty-making power, to conform to the restrictions of the Constitution, *the possession of an unlimited supreme power in any person or any body of men is not consistent with a republican form of government*, and its possession by them is a constant menace to the liberties of the people.

"Chief Justice Taney has powerfully expressed his views on this subject:

" 'It will hardly be said, that such a power was granted to the general government in the confidence that it would not be abused. The statesmen of that day were too wise and too well read in the lessons of history and of their own times, to confer unnecessary authority under any such delusion.'

"In the same case, page 516, Justice Daniel says:

" 'If this extraordinary proposition can be taken as universally or as generally true, . . . the Constitution of the United States with all its limitations on Federal power, and as it has been heretofore generally understood to be a special delegation of power, is a falsehood or an absurdity. It must be viewed as the creation of a power transcending that which called it into existence; a power single, universal, engrossing, absolute. Everything in the nature of civil or political right is thus engulfed in federal legislation, and in the power of negotiating treaties.' "

Tucker, Lim. Treaty-Making Power, pp. 128-129.

" 'The Federal Government' is often carelessly spoken of as having its existence independent of and without relation to the States. Many fail to observe not only the close con-

nection which the States have with the Federal Government, but the fact that *the States are integral parts of the Federal Government, without which the latter could not exist.* In one sense they are the underpinning, in another they are the piles upon which the structure rests, and neither can be withdrawn without damage to the structure they support.

"An examination of the Constitution shows this very plainly. Article I, sec. 2, shows that the House of Representatives is dependent upon the States for its existence. Article I, sec. 3, (now the 17th Amendment) shows that the Senate is dependent for its existence upon the States. Article II shows that the office of President is dependent upon the States. The judicial power of the United States, as set forth in Article III, recognizes the States as integral parts of the Federal Government; and when we look at the distribution of powers under the Constitution, giving to different departments specific powers, it is difficult to understand, if this was necessary to prevent the absorption of unlimited power in any one hand, *how this power as now claimed found its way into the Constitution, supreme over all others and acknowledging its inferiority not even to the Constitution itself;* with no guide but its own will; with no restraint but its own ambition; with no limits but its own greed."

Tucker, Lim. Treaty-Making Power, pp. 135-136.

"On still another side this question of the direct relation between the treaty-power and the legislative power makes it difficult to fix the limits of the treaty power. *It is certain that no authority granted by the constitution to any of the factors of government can be withdrawn from it by treaty.* For that would be a change of the constitution and, as such, unconstitutional."

Von Holst, Constitutional Law of the United States, p. 202.

". . . . ; and in order to ascertain whether the execution of the treaty-making powers can be supported in any given case, those principles of the Constitution from which the power proceeds should carefully be applied to it. The power must,

indeed, be construed in subordination to the Constitution; and, however in its operation it may qualify, it cannot supersede or interfere with any other of its fundamental provisions, nor can it ever be so interpreted as to destroy other powers granted by that instrument. A treaty to change the organization of the Government, or annihilate its sovereignty, or overturn its republican form, or to deprive it of any of its constitutional powers, would be void; *because it would defeat the will of the people, which it* was designed to fulfill.'

Duer, Lectures on the Constitutional Jurisprudence of the United States, (2 Ed.) p. 228.

"I have followed this historical treatment of the treaty-making power from the Constitutional Convention of 1787, to the present time, purposely omitting any direct mention of the decisions in order that we might see what effect those decisions had from time to time upon the definitions and descriptions of the power as given by subsequent writers. The result is interesting and peculiar. In 1802 Tucker, the first author, cited no authority except the text of the Constitution; thirty years later Story cited Tucker, Rawle and Jefferson; while in 1880 Cooley cites Tucker and Story, as herein quoted, in support of his text. The reason for this is plain, since the judicial decisions have been only so many applications of the general rule to specific statements of fact. For it is readily seen that while many of the decisions contain broad general statements to the effect that treaties are the supreme law of the land, there is always the accompanying qualification that it must be a constitutional treaty in order to be so considered."

Judge Shackelford Miller, quoted in Tucker, Lim. Treaty-making Power, pp. 21, 22.

"But even if the provisions of the statute did clash with the stipulations of that, or of any other treaty, the conclusion is not deducible that the treaty must, therefore, stand, and the state law give way. The question in such case would not be solely what is provided for by the treaty, but whether the state retained the power to enact the contested law, or had

given up that power to the general government. If the state retains the power, then the president and senate cannot take it away by a treaty. A treaty is supreme only when it is made in pursuance of that authority which has been conferred upon the treaty-making department, and in relation to those subjects the jurisdiction over which has been exclusively entrusted to Congress. When it transcends these limits, like an act of Congress which transcends the constitutional authority of that body, *it cannot supersede a state law which enforces or exercises any power of the state not granted away by the constitution.* To hold any other doctrine than this, would, if carried out into its ultimate and possible consequences, sanction the supremacy of a treaty which should entirely exempt foreigners from taxation by the respective states, or which should even undertake to cede away a part or the whole of the acknowledged territory of one of the states to a foreign nation. . . .

"It is not within the scope of a constitutional treaty to interfere with the reserved powers of taxation and of control over foreigners, which we have above discussed. No treaty, within our knowledge, has attempted to do it; and if such attempt should be made, the stipulation would, we apprehend, be neither recognized nor enforced by the supreme tribunal of the nation. . . ."

The People v. Naglee, 1 Cal. 246, 247.

"The second school stand upon the doctrine that the treaty-making power exists for the purpose of carrying out the purposes and objects of this Government as prescribed and defined by the Constitution, and that no treaty is valid that violates the Constitution, or *that under its provisions surrenders the rights reserved and belonging to the states.*"

Senator Rayner, 59th Congress, 41 Congressional Record, Part 1, p. 299.

"What limits does it place upon the treaty-making power? None whatever. There is no limit to the exercise of this power when reduced to any particular case, but it is to the form of executing the power which is a simple concurrence of two-

thirds of the Senate. I do not say that there is no check or restriction upon the functions of the Government, for there is this limit, that *it cannot be exercised in the destruction of or in opposition to any known Constitutional right or power, and must be subordinate to every other right recognized.*"

William Archer Cocke, Constitutional History of the United States, p. 235.

"It is not, as you will perceive by examining Mr. Drouyn de L'Huys's dispatch to the Count de Sartiges, the application of the 'principle' to the particular case of M. Dillon, which is to be disavowed, but the broad and general proposition that the Constitution is paramount in authority to any treaty or convention made by this government. This principle, the President directs me to say, he can not disavow, nor would it be candid in him to withhold an expression of his belief that if a case should arise presenting a direct conflict between the Constitution of the United States and a treaty made by authority thereof, and be brought before our highest tribunal for adjudication, the court would act upon the principle that the Constitution was the paramount law."

Mr. Marcy, Moore's Int. Law Dig., Vol. V, p. 168.

"In re Rahrer, 140 U. S. 554, the Supreme Court of the United States, speaking through Chief Justice Fuller, made use of the following language: 'The power of the State to impose restraints and burdens upon persons and property in conservation and promotion of the public health, good order, and prosperity, is a power originally and always belonging to the States, not surrendered by them to the general government, nor directly restrained by the Constitution of the United States, and essentially exclusive. And this court has uniformly recognized State legislation, legitimately for police purposes, as not, in the sense of the Constitution, infringing upon any right which has been confided, expressly or by implication, to the general government. . . . .'

"The treaties and laws of the United States must be held to have been passed with reference to and subsidiary to the

rightful exercise of the police power by the different States in said of the protection and preservation of the public health within their respective borders."

Compagnie v. Board, 51 La. Ann. 645; Affirmed 186 U. S. 380.

"The claim asserted for the treaty-making power that it may embrace all rights and all subjects because the word 'Treaty' may embrace such, cannot be maintained for another reason. The principle must be accepted as established, that where in any instrument a *general* grant is made, which is followed in the same instrument by a *specific* grant, that the 'general' is limited by the 'specific' grant. This is undoubtedly true of wills and deeds. A testator who devises *all* of his real estate to his wife and in a subsequent portion of his will devises his home place to his son, is considered to have limited the devise of *all* of his real estate to his wife by the *specific* devise of the home place to his son. The same principle will apply to a deed of real estate.

"This principle applies peculiarly to the case of the treaty power. Article II, sec. 2, grants to the President and Senate the power, without any limitation, to make treaties; since treaties may embrace all rights of person and property, some of which may be included in the powers granted in the same Constitution, to the President, to the Congress, the Judiciary, and some also, which by the same instrument, are reserved to the States, this would seem to be a sweeping and unlimited general grant to the treaty-making power; but when we find the same instrument, which has made this unqualified *general* grant to the treaty power, has granted to the President, to the Congress, to the Judiciary, certain specific powers, and reserved to the States certain *specific* powers and rights, the *general* grant to the treaty-making power is limited by the *specific* grants mentioned. This is the well-established rule of construction, and to hold otherwise would be to hold that the Convention, after carefully constructing a constitutional government, granted to one of the branches of the government the power to destroy it all."

Tucker, Limitations, Treaty-making Powers, pp. 93-94.

"It would be to convict the framers of the Constitution of a lack of foresight, which cannot properly be imputed to them, to suppose they intended to give to this treaty-making power unlimited scope to absorb every right of the people of the States, against which they had so carefully guarded in the enumeration of the powers of Congress and by the reservations in the Tenth Amendment. The powers of Congress, the Executive, and the Judiciary were enumerated in detail. And all powers not granted were, under the Tenth Amendment, reserved to the States or to the people respectively. Of what avail it it to know that the Framers of the Constitution securely preserved to the people their sacred local rights from the grasp of Congress, the President, or the Judiciary if they can be absorbed under the treaty-making power? If the Federal Government can take them, it matters little what department may claim the right."

Tucker, Limitations, Treaty-making Power, pp. 86-87.

"For themselves our fathers were not content with an assurance of these great rights that rested wholly upon the sense of justice and benevolence of the Congress. The man whose protection from wrongs rests wholly upon the benevolence of another man or of a congress, is a slave, a man without rights. Our fathers took security of the governing departments they organized, and that notwithstanding the fact that the choice of all public officers rested with the people. They were not content with general and unwritten limitations, but forced into the Constitution written limitations as to the exercise of sovereignty by the ruling power."

Butler, Treaty-making Power. Vol. I, p. 63, Sec. 37, and note.

See Benjamin Harrison in North American Review, January, 1901, p. 110.

"The theory of fundamental principles had its inception as early as the framing of the Constitution. To many the adoption of the first ten amendments, commonly known as the Bill of Rights, was wholly unnecessary. There were

members of the Constitutional Convention who considered that the enumeration of certain fundamental rights would be dangerous, as it might result in the exclusion and to the derogation of other rights equally fundamental, but which might possibly be omitted in the enumeration. The first ten amendments, however, were added in order to satisfy the wishes of those who felt that the personal rights of feedom and liberty therein enumerated should be specifically preserved to the people."

See 1 Story's Commentaries on the Constitution, 5 Ed., pp. 217-220;
Thorp, Constitutional History, Vol. 2, Chap. 6, p. 199.

"The theory of our governments, State and National, is opposed to the deposit of unlimited power anywhere. The executive, the legislative, and the judicial branches of these governments are all of limited and defined powers.

"There are limitations on such power which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name."

Loan Association v. Topeka, 20 Wall. 655, 662-663.

Those who hold that a treaty is the supreme law of the land say that "If the framers of the Constitution had intended to correlate the treaty-making power of the United States with the law-making power of Congress, or to otherwise limit its scope, they would have so expressed themselves, and then instead of appearing as it does, this article would have probably been written as follows: This Constitution and the laws of the United States, and all treaties made or which shall be made in pursuance thereof, shall be the supreme law of the land."

This argument overlooks the fact that the United States existed under the Articles of Confederation and the purpose was to include treaties made under that authority as well as

those which should be made under the Constitution. The "*Authority of the United States*" under the Articles of Confederation and under the Constitution was an authority derived from enumerated powers accompanied by specific reservations, and under both the Articles of Confederation and the Constitution certain rights of the states respectively and the people were jealously guarded by express exceptions. There was and could be no "authority of the United States" outside of and beyond that given by the Articles of Confederation and the Constitution.

That a treaty stands upon an equal footing with law of the United States is settled (Cherokee Tobacco, 11 Wall. 616; Ward v. Race Horse, 163 U. S. 504). Supremacy is to be predicated of neither; each takes its place *under the Constitution*, and only when in harmony with the powers therein granted or excepted is of any binding effect whatever. In the language of Mr. Madison:

> "It must have meant to except out of these the rights reserved to the States, for surely the President and Senate cannot do by treaty what the whole Government is interdicted from doing in any way." Jefferson, Manual of Parliamentary Practice, p. 110, note 3.

The term "treaty" as herein used must undoubtedly be given a broad meaning, and generally speaking, it may be said that by this clause there is conferred the power to make treaties on those matters ordinarily the subject of treaties between sovereign powers. But in the very nature of things, there must be placed a limit on the treaty-making power, else that power would destroy many of the other provisions of the Constitution. One of the canons of construction is that a meaning must be placed on one part of the Constitution that will not interfere with the meaning of the other parts thereof, in order that effect may be given to the whole.

Can the power of Congress "to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water" be taken away by treaty, and conferred upon other authority?

Can the power of Congress "to coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures" be taken away by treaty, and conferred upon other authority?

The powers of the states as set forth in the Constitution are upon an absolutely equal footing with the powers of the United States. Can, therefore, a power by the Constitution reserved to the states be taken away by the treaty-making power?

No one, it seems to us, would have the temerity to maintain that the treaty-making power would have authority to make any treaty divesting the Congress, or the United States, of any of its constitutional powers, and the conclusion, therefore, is inescapable that the power to make a treaty, or to make treaties, is not an unrestricted power.

The only difficulty with respect to the subject is, Where shall the line of restriction be drawn? We submit the following rule:

The treaty-making power is unrestricted, except that no treaty shall violate any of the provisions of the Constitution, and shall not violate any of the powers of the United States, or any of the powers reserved to the states. The power to by treaty violate the present powers of the United States, or the powers now reserved to the states, is reserved "to the people," and when the necessity arises the people will create by appropriate amendment to the Constitution an instrumentality through which to make such a treaty.

Distinguished authority exists for such a rule. John C. Calhoun (4 Elliott's Debates, p. 464), in discussing the limitations on the treaty-making power, said:

> "Whatever requires the consent of another nation belongs to the treaty power—can only be regulated by it; and it is competent to regulate all such subjects, provided—and here are its true limits—such regulations are not inconsistent with the Constitution. If so, they are void. No treaty can alter the fabric of our Government; nor can it do that which the Constitution has expressly forbidden to be done; nor can it do that differently which is di-

rected to be done in a given mode, and all other modes prohibited."

Differing in verbiage only, Mr. Justice Field, in *Geofroy vs. Riggs*, 133 U. S. 266-7, laid down a similar rule:

> "That the treaty power of the United States extends to all proper subjects of negotiation between our Government and the government of other nations is clear. The treaty power as expressed in the Constitution is in terms unlimited, except by those restraints which are found in that instrument against the action of the Government or of its departments and those arising from the nature of the government itself and *of that of the states.* It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the Government, or *in that of one of the states,* or a cession of any portion of that territory of the latter, without its consent. *Railroad Co. vs. Lowe,* 114 U. S. 523, 541. But with these exceptions, it it not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country."

XII.

The cases usually cited by those who advocate the supremacy of a treaty do not in any instance hold that the reserved powers of a state or a trust which the state holds for the benefit of all its people are subject to and may be annulled by a treaty having for its subject the regulation of a matter which is reserved to the states respectively or to the people by the Tenth Amendment.

The case most often cited and quoted by those who claim that a treaty is the supreme law of the land is Ware v. Hylton, 3 Dallas 199. Five judges sat in the case, but only four took any part in its decision. Each rendered a separate opinion. There was no opinion by the court. Three of the

four judges "held either that the state law was invalid, or, if valid, that it did not actually attempt to confiscate debt." In either case there could have been no conflict between the law and the treaty, according to the majority of the court, since either there was no law, because invalid, or it did not attempt to do anything contrary to the terms of the treaty. Mr. Justice Chase did hold that Virginia had a right to confiscate debts, and by the law of 1777 did confiscate debts, but this was no defense in the face of the Treaty of Peace. This was not the opinion of the court, nor the opinion of a majority of those who decided the case. (See Tucker, Limitations on Treaty-making Power, Chap. 7, p. 173 et seq.)

The case of Chirac v. Chirac, 2 Wheat. 259, and the case of Geofroy v. Riggs, 133 U. S. 266, do not hold that the treaty annuls the laws of inheritance passed by the states, but that the badge of alienage which prevented their taking under the laws of the states, was removed. The laws of the state were in full force and effect, but only the Federal Government could declare who was an alien. Mr. Justice Field, who wrote the opinion in Geofroy v. Riggs, wrote the opinion in Fox v. United States, 94 U. S. 320, in which he said:

> "The power of the State to regulate the tenure of real property within her limits, and the modes of its acquisition and transfer, and the rules of its descent, and the extent to which testamentary disposition of it may be exercised by its owners, is undoubted. It is an established principle of law, everywhere recognized, arising from the necessity of the case, that the disposition of immovable property, whether by deed, descent, or any other mode, is exclusively subject to the government within whose jurisdiction the property is situated."

If it be held that Geofroy v. Riggs holds that a state law relating to inheritance is annulled by the treaty, it is in direct conflict with the case of Fox v. United States. The cases should be held to harmonize rather than to conflict, particularly as both were written by the same judge and no reference is made in the former to the latter.

The cases of Orr v. Hodgson, 4 Wheat. 453, and Fairfax v. Hunter, 7 Cranch 603, were both decided by Justice Storey upon the same principle; namely, that the badge of alienage was removed and the law of the state remained intact, and all who inherited in the state took under the terms of that law.

The principle of the above cases is thus stated in the case of People v. Gerke, 5 Cal. 381, 384:

> "One of the arguments at bar against the extent of this power of treaty is that it permits the Federal Government to control the internal policy of the states, and in the present case, to alter materially the statute of distribution.
>
> "I think, however, that no such consequence follows as is insisted. The statutes of distribution are not altered or affected. Alienage is the subject of the treaty. This disability results from political reasons which arose at an early period of the history of civilization, and which the enlightened advancement of modern time and changes in the political and social condition of nations have rendered without force or consequence. The disability to succeed to property is alone removed. *The character of the person is made politically to undergo a change, and then the statute of distribution is left to its full effect unaltered and unimpaired in word or sense.*"

> "If my conclusions about these cases be not correct, this anomaly is presented that the Supreme Court from Ware v. Hylton to Geofroy v. Riggs has decided uniformly that a treaty annulled state laws in conflict with it and yet has recently decided the cases of Compagnie Francaise v. The Board of Health, Rocca v. Thompson, Patsone v. Pennsylvania, and Heim v. McCall, sustaining the laws of States which conflicted with existing treaties between the United States and foreign countries. To adopt such a conclusion is to hold that the Supreme Court has reversed its position on this question. This I do not believe, but more rationally these later

> decisions serve to interpret the earlier ones, making the action of the Court throughout its history consistent and uniform."
>
> Henry St. George Tucker, Address before Georgia Bar Association, June 2nd, 1917, p. 23.
>
> See also Tucker, Limitations on Treaty-making Power, Chap. 6, p. 143 et seq.

The case of Haunenstein v. Lynham, 100 U. S. 483, involves a treaty and a state law of Virginia. The Virginia law provided that an alien who, by treaty, had a right to sell real property in that state, might do so within the time prescribed by such treaty. No time was prescribed in the treaty, and the Virginia court held that the land escheated to the state. The Supreme Court of the United States held that a reasonable time was presumed, though no time was specified in the treaty. This does not present a case of conflict in any sense.

The lower court, in deciding this case at bar and in holding that the treaty-making power could annul a trust held by the State for the benefit of all its people, and its reserved powers, cites the case of Hoke v. United States, 227 U. S. 321-322. That case in no manner involves a treaty and is a discussion of the powers of Congress over interstate commerce. Instead of being an authority in support of the contention of the lower court, its "foreshadowing" is in our favor to this extent:

> "It may be that Congress could not prohibit the manufacture of the article in a state. It may be that Congress could not prohibit in all of its conditions its sale within a state."
>
> Hoke v. United States, 227 U. S. l. c. 322.

The real basis of the opinion of the lower court holding that while the law would be unconstitutional if it stood alone, but was constitutional in that it was made in aid of a treaty, seems to be an opinion of a former Attorney-General of the United States, Mr. John W. Griggs (Vol. 22, Opinions of Attorney-General, p. 215 et seq.).

We do not doubt the power of the United States to make a treaty with Great Britain concerning regulations for the taking of fish or seals within waters or territory over which Great Britain and the United States under their Constitutions have power to make such regulations. That is a very different proposition from the one here involved; namely, the power of Congress to acquire by treaty the right to make rules and regulations for the taking of wild game within territory within which, under our Constitution, Congress has no right to regulate the taking of such game. In the language of United States v. DeWitt, 9 Wall. 41:

> "As a police regulation, relating exclusively to the internal trade of the states, it can only have effect where the legislative authority of Congress excludes, territorially, all state legislation, as, for example, in the District of Columbia. Within state limits, it can have no constitutional operation."

When the Federal Government acts through its power to control commerce, its action is limited by the extent of its power under the Constitution. When the Federal Government acts under its treaty-making power, the binding effect of the things which it agrees to do is limited by its power under the Constitution to do those things. The power of the Federal Government to make treaties is exclusive and plenary, *but the things which it can bind itself to do under a treaty are limited by the powers which it possesses under the Constitution and by any and all exceptions to its power specified in the Constitution.* There is a difference between exclusive and full power to make treaties and the power to insert in the treaty terms and conditions which shall bind the United States to do any and every thing. The Government of the United States is one government, but that government does not possess the power to do any and every thing. There are some things which remain at the pleasure and will of the source of all power—the people. There are some things which the people never intended that the Federal Government should have the power to do. To give the Federal Government the power to do those things, by treaty, is to enlarge the jurisdiction of

the United States by construction, defeat the will of the people, and effectually change the form of government designed by the Constitution. It means the establishment of a principle which, followed to its ultimate and logical conclusion, means that nothing is reserved to the states or to the people. In the language of Mr. Justice Daniel in the Passenger cases: "Every thing in the nature of civil or political rights is thus engulfed in Federal legislation, and in the power of negotiating treaties."

The power of the Federal Government and the government of Great Britain to provide, by treaty, the terms upon which the citizens of one may take game within the territory of the other, or to agree by treaty that they will fix the time when and the methods by which fish and game may be taken *within the territory over which the respective governments have power to prescribe such times and methods,* **is one thing, but it is another and very different thing for such governments, in such treaty,** *to provide the Federal Government with the power* **to prevent its own citizens from taking wild game within the limits of their respective states,** *when, under the Constitution, the Federal Government possesses no such power.*

The learned District Judge who delivered the opinion below seems to have been largely influenced in his decision by the advantages to be obtained through the treaty in question. He says (Printed Abstract, p. 13):

> "The people of both countries, of our entire union and of all the states, benefit by the mutual and reciprocal advantages which accrue from this arrangement. If this be so, then the subject matter comes properly within the treaty-making power."

We do not believe that, under the Constitution and the general grant of power to make treaties, it was ever intended that the Federal Government had the power to do *anything and everything which it might deem to the advantage of the people.* Such power, in effect, would be unlimited power, because it would embrace within its scope anything and everything.

To this argument we reply in the language of General George Washington:

> "If, in the opinion of the people, the distribution of Constitutional powers be in any particular wrong, let it be corrected in the way which the Constitution designates. But let there be no change by usurpation, for this, though it be in one instance be the instrument of good, is the ordinary weapon by which free governments are destroyed."

And in the language of Abraham Lincoln:

> "It is my duty and my oath to maintain inviolate the right of the states to order and control, under the Constitution, their own affairs, by their own judgment exclusively. Such maintenance is essential for the preservation of that balance of power on which our institutions rest."

And in the language of Mr. Chief Justice Fuller, in United States v. Knight, 156 U. S. 13:

> "Acknowledged evils, however grave and urgent they may appear to be, had better be borne than the risk be run, in the effort to suppress them, of more serious consequences by resort to expedients of even doubtful constitutionality."

XIII.

In its ultimate analysis the adoption of the Treaty-Supremacy theory means that the Federal Government, through the treaty-making department of the government, has a *general negative* upon all state laws passed by the States in the exercise of their reserved powers. In the making of the Constitution a negative, in any form, upon laws passed by the States in the exercise of their reserved powers, was defeated though persistently urged, in some form, by some of the ablest men in the Constitutional Convention. It was universally admitted that under the Constitution as it stood the Federal Government had no such power, and by the first ten amendments the people undertook to forestall any attempt on the part of the Federal Government to obtain such power by construction.

The history of the making of the Constitution of the United States shows beyond question that the most liberal constructionists of the Constitution saw, and frankly admitted, the fundamental limitations of the Federal Government which were inherent in the very nature and character of the Government itself. Recognizing the fundamental limitations of the Federal Government and the extent of the powers reserved to the several states under the Constitution as written, they endeavored and labored to their utmost to insert into the Federal Constitution some provision which would give Congress a negative upon the laws passed by the several states in the exercise of their reserved powers. Mr. Randolph, Mr. Pinckney, Mr. Patterson and Hamilton all proposed provisions of this nature, but in vain. Mr. Calhoun, speaking of this struggle to subject the reserved powers of the state to a federal negative, says:

> "It is not deemed necessary to trace, through the journals of the convention, the history and the fate of these various propositions. It is sufficient to say,—that they were all made, and not one adopted, although perseveringly urged by some of the most talented and influential members of the body, as indispensable to protect the government of the United States, against the apprehended encroachments of the governments of the several states. The fact that they were proposed and so urged proves, conclusively, that it was believed, even by the most distinguished members of the national party, that the former had no right to enforce its measures against the latter, where they disagreed as to the extent of their respective powers,—without some express provision to that effect; while the refusal of the convention to adopt any such provision, under such circumstances, proves, equally conclusively, that it was opposed to the delegation of such powers to the government, or any of its departments, legislative, executive, or judicial, in any form whatever.
>
> "But, if it be possible for doubt still to remain, the ratification of the Constitution by the convention

> of Virginia, and the 10th amended article, furnish proofs in confirming so strong that the most skeptical will find it difficult to resist them." Works of Calhoun, pp. 266-247.

Although these attempts to give the Federal Government some negative upon the reserved powers of the states failed, and although the Nationalists openly recognized the fundamental limitations of the Constitution inherent from the nature and character of the instrument itself, some of the states were not willing to ratify the Constitution until that instrument itself expressly set forth certain limitations and restrictions upon its own power. In other words, they were unwilling to rest their reserved powers upon the fundamental limitations which arose from the nature and character of the Federal Government, but they insisted upon writing into the Constitution itself express limitations and restrictions upon the power of the Federal Government in relation to the reserved powers of the several states. As a result, some of the states, particularly Virginia, Massachusetts, New Hampshire, South Carolina and New York, deeply concerned about the reserved powers of the states and fearful lest some construction might be put upon the Constitution which would impair, if not destroy, those reserved powers, insisted upon, and put into their ratification of the Constitution, the express conditions later embodied in the original amendments. The Nationalists in vain insisted that such amendments were unnecessary, because they were secured by the fundamental limitations inherent in the nature and character of the Government. The states took no chances. They believed in the fundamental limitations arising out of the nature of the Federal Government, but they insisted that the Constitution should contain express limitations which future construction could not override. Mr. John C. Calhoun, speaking of Virginia's ratificaratification, said:

> "That her object was to guard against the abuse of construction, the act itself, on its face, and the discussions in her convention abundantly prove. It was done effectually, as far as it depended on

words. It declares that all powers granted by the Constitution, are derived from the people of the United States; and may be *resumed* by them when *perverted* to their injury or oppression; and, that every power *not granted*, remains with them, and at their will; and that no right of any description can be canceled, abridged, restrained or modified by Congress, the Senate, the House of Representatives, the President, or any department, or officer of the United States. Language cannot be stronger. It guards the reserved powers against the government as a whole, and against all its departments and officers; and in every mode by which they might be impaired; showing, clearly, that the intention was to place the reserved powers beyond the possible interference and control of the government of the United States." Works of Calhoun, pp. 249-250.

Since the powers reserved to the several states were protected not only by refusal to insert in the Constitution any provision which would give to the Federal Government a negative upon such powers, but also by express limitations upon the construction of enumerated powers, and the specific reservation to the states, respectively, or to the people, of all power not delegated to the United States by the Constitution, nor prohibited by it to the states, it is difficult to understand the logic of the contention which claims for the treaty-making power a negative upon the powers reserved to the several states. A part cannot be greater than the whole; the Federal Government in its entirety cannot be subject to the fundamental limitations arising out of its nature and the conditions of its organization, and to the express limitations written into the Constitution itself, and still, at the same time, the treaty-making power—which is only one of the enumerated powers—be absolute and unlimited. The treaty-making power has no supremacy apart from the Constitution, and can have no authority outside of and beyond the fundamental and express limitations of that instrument.

CONCLUSION.

Treaties are not to be treated with levity, nor are they to be given a sanctity which shields them from inspection and rejection, if, by their terms they do that which the Constitution forbids, and destroy essential rights of the States respectively or the people.

> "I cannot conceive how it can be held that pledges made to an alien people can be treated as more sacred than is that great pledge given by every member of department of the government of the United States to support and defend the Constitution."
>
> Downes v. Bidwell, 182 U. S. 244, l. c. 344.

But in the case at bar, may we not preserve both the treaty and the rights guaranteed by the Constitution?

In the case of Compagne v. Board, 186 U. S. 380, 395, this Court said:

> ". . . the treaty was made *subject to* the enactment of such health laws as the local conditions might evoke *not paramount to them.*"

In the case of Heim v. McCall, 239 U. S. 175, 194, commenting upon the case of Patsone v. Pennsylvania, this Court said:

> "Adopting the declaration of the court below, it was said 'that the equality of rights that the treaty assures is equality only in respect of protection and security for persons and property.' And the rulin was given point by a citation of the power of the state over its wild game, which might be preserved for its own citizens. In other words, the ruling was given point *by the special power of the state over the subject-matter*,—a power which exists in the case at bar, as we have seen."

May it not in the case at bar, as in the above cases, be said that the treaty is made subject to the "*special power of the state*?" As a matter of fact, does not the treaty itself show this upon its face?

"ARTICLE VIII.

"The High Contracting Powers agree themselves to take, *or propose to their respective appropriate law-making bodies*, the necessary measures for insuring the execution of the present convention."

May this not be construed as obligating the Federal Government "to take" the necessary measures in such territory as it has, under the Constitution, the power "to take" measures for regulating the taking of wild game therein, and further obligating the Federal Government, *not "to take,"* but *"to propose"* to the "appropriate law-making bodies"—that is, the legislatures of the several states—the necessary measures for regulating the taking of wild game within the borders of the respective states wherein the states only have the power, under the Constitution, to take such measures?

The High Contracting Powers must be held to have known that the power of the Federal Government did not extend to the taking over of a trust exercised by the state in relation to the common property of its citizens, or the enactment of mere police regulations within the limits of a state; and the language of Article VIII seems to indicate that they both knew and acted upon this knowledge.

Such construction leaves both the treaty and the laws of Missouri intact and in force. It results in holding unconstitutional only an act of Congress which was not necessarily required by the treaty, and which, under the Constitution, Congress had no power to pass.

Respectfully submitted,
FRANK W. McALLISTER,
Attorney-General of Missouri,
JOHN T. GOSE,
Assistant Attorney-General of Missouri,
Solicitors for Appellant.

J. G. L. HARVEY,
of Counsel.

√

INDEX.

	Page.
HISTORY OF THE CASE	1–2
THE TREATY	2–4
THE ACT OF CONGRESS	5
QUESTION INVOLVED	5
CONTENTIONS OF APPELLANT	5
CONTENTIONS OF APPELLEE	6
BRIEF	6–46
I. Jurisdiction	6–7
II. Act of 1913, involved in the *Shauver* case, was a constitutional exertion of power by Congress. The present act would, therefore, be valid, even if its provisions had not been enacted for the purpose of giving effect to a treaty	7–8
III. The Constitution expressly grants to Congress the power to enact such laws as may be necessary to give effect to treaties	8–13
IV. The power of the State over game is limited by such powers as have been conferred upon the Federal Government	13–14
V. The power of Congress to legislate to make treaties effective is not limited to the subjects with respect to which it is empowered to legislate in purely domestic affairs	14–17
VI. The power of the Federal Government to make and enforce treaties is not a limitation on the reserved powers of the States but is the exercise of a power not reserved to the States under the Tenth Amendment, being both expressly granted to the United States and prohibited to the States	18–24
VII. The treaty-making power of the United States embraces all such power as would have belonged to the several States if the Constitution had not been adopted. In the exercise of that power the Federal Government is the accredited agent of both the people of the United States and the States themselves	25–27
VIII. Unsoundness of appellant's contentions	27–35
IX. The treaty-making power applies to all matters which may properly be the subject of negotiations between the two governments	36–41
X. The protection of migratory game is a proper subject of negotiations and treaties between the governments of the countries interested in such game	42–46
CONCLUSION	46
APPENDIX A	8, 47–62
APPENDIX B	8, 42, 63–79

165572—20—1

AUTHORITIES CITED.

	Page.
Baldwin v. *Franks*, 120 U. S. 678, 682–683	11, 12, 26–27
Chinese Exclusion Case, 130 U. S. 581, 600, 604	12, 15
Chirac v. *Chirac*, 2 Wheat. 259, 276	23
Cohens v. *Virginia*, 6 Wheat. 264, 413	15
Elliott's Debates, vol. 4, p. 464	36–37
Foster and Elam v. *Neilson*, 2 Pet. 253, 314	13
Geer v. *Connecticut*, 161 U. S. 519, 528	13
Geofrey v. *Riggs*, 133 U. S. 258, 266	23, 40–41
Hauenstein v. *Lynham*, 100 U. S. 483, 490	16
Hopkirk v. *Bell*, 3 Cranch 453	23
In re Ross, 140 U. S. 453, 463	17, 41
Knox v. *Lee*, 12 Wall. 457, 555	15
State of Missouri v. *Holland*, 258 Fed. 479, 484	8, 43–44
Story on the Constitution, 5th Ed., sec. 1508	37–38
United States v. *43 Gallons of Whiskey*, 93 U. S. 188, 196	13, 23
United States v. *Jin Fuey Moy*, 241 U. S. 394	12
United States v. *McCullagh*, 221 Fed. 188	2
United States v. *Rockefeller*, 260 Fed. 346, 347–8	8, 44–45
United States v. *Shauver*, 214 Fed. 154	2, 8
United States v. *Thompson*, 258 Fed. 257, 264	8, 20
United States v. *Winans*, 198 U. S. 371	23
Ware v. *Hylton*, 3 Dall. 199, 235	23, 39–40
Wildenhus's Case, 130 U. S. 1, 17	21–22

STATUTES CITED.

37 Stat., c. 145, pp. 828, 847	2
39 Stat., Part 2, p. 1702	2
40 Stat., c. 128, p. 755	1, 2

CONSTITUTION.

Article I, sec. 8	7, 10
Article I, sec. 10, cl. 1	9
Article II, sec. 2, cl. 2	9
Article IV, sec. 3	7
Article VI, cl. 2	9–10

In the Supreme Court of the United States.

OCTOBER TERM, 1919.

THE STATE OF MISSOURI, APPELLANT,
v.
RAY P. HOLLAND, UNITED STATES GAME WARDEN. } No. 609.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

BRIEF FOR APPELLEE.

This is an appeal from a decree of the District Court dismissing a bill filed by the State of Missouri against a United States game warden, seeking to enjoin the enforcement of an Act of Congress known as the Migratory Bird Law. 40 Stat., c. 128, p. 755.

HISTORY OF THE CASE.

In 1913 Congress, recognizing the necessity of preserving the bird life of the country, and also recognizing that in the case of birds which migrated and remained in one section during a part of the year and in another section or another country during other parts of the year the States could not afford adequate protection, passed an Act intended to protect such

migratory birds. 37 Stat., c. 145, pp. 828, 847. In criminal prosecutions commenced under this Act in two districts the District Courts held the Act unconstitutional because beyond the power of Congress. *United States* v. *Shauver*, 214 Fed., 154; *United States* v. *McCullagh*, 221 Fed., 288. In the *Shauver* case, supra, the court sustained a demurrer to an indictment, and the case was brought to this court on writ of error. It was argued at the October Term, 1915, but was later remanded by the court for reargument. In the meantime, however, a treaty with Great Britain was negotiated for the purpose of protecting, by the action of both countries, such birds as customarily migrated at different seasons of the year between Canada and the United States. 39 Stat., Part 2, p. 1702. And later Congress passed an Act to give effect to this treaty. 40 Stat., c. 128, p. 755. Since this statute superseded that of 1913 and established, for the future, the rule of law, the Government did not regard a decision of the *Shauver* case of sufficient importance to justify further prosecution, and hence dismissed its writ of error.

The State of Missouri, claiming to be the owner, as trustee for all its people, of wild game and birds within its borders, filed its bill to enjoin the enforcement of the later act of Congress.

THE TREATY.

The purpose sought to be accomplished by the treaty is recited in the preamble as follows:

> Whereas, Many species of birds in the course of their annual migrations traverse certain

parts of the United States and the Dominion of Canada; and

Whereas, Many of these species are of great value as a source of food or in destroying insects which are injurious to forests and forage plants on the public domain, as well as to agricultural crops, in both the United States and Canada, but are nevertheless in danger of extermination through lack of adequate protection during the nesting season or while on their way to and from their breeding grounds; * * * .

Article I contains an enumeration of three general classes of birds which are included in the terms of the convention:

1. Migratory game birds.
2. Migratory insectivorous birds.
3. Other migratory nongame birds.

Article II provides for close seasons, during which no hunting shall be done except for scientific or propagating purposes under permits issued by proper authorities. The close season on migratory game birds, with certain exceptions, is to be between March 10 and September 1, with a provision that the season for hunting shall be further restricted to such period, not exceeding three and one-half months, as the High Contracting Powers may severally deem appropriate and define by law or regulation. The close season on migratory insectivorous birds is to continue throughout the year. The close season on other migratory nongame birds is to continue throughout the year, with a certain exception in favor of the Eskimos and Indians.

Article III provides that during a period of ten years following the going into effect of the Convention, there shall be a continuous close season on certain migratory game birds, which are enumerated.

Article IV provides that special protection shall be given the wood duck and the eider duck, either by a close season extending over a period of at least five years or by the establishment of refuges, or by such other regulations as may be deemed appropriate.

Article V prohibits the taking of nests or eggs of migratory game or insectivorous or nongame birds, except for scientific or propagating purposes.

Article VI contains provisions against the shipment or export of migratory birds or their eggs.

Article VII provides for permits to kill any of the above-named birds under extraordinary conditions.

Article VIII is as follows:

> The High Contracting Powers agree themselves to take, or propose to their respective appropriate law-making bodies, the necessary measures for insuring the execution of the present Covention.

Article IX provides that after ratification the treaty shall remain in force for 15 years, and in the event of neither of the High Contracting Powers having given notification, 12 months before the expiration of the period of 15 years, of its intention to terminate the same, the convention shall continue to remain in force for one year and so on from year to year.

This treaty went into effect on December 8, 1916.

THE ACT OF GONCRESS.

The Act in question is entitled—

> An Act to give effect to the convention between the United States and Great Britain for the protection of migratory birds concluded at Washington, August sixteenth, nineteen hundred and sixteen, and for other purposes.

It follows closely the provisions of the treaty, makes unlawful the things which the treaty provided should be unlawful, and authorizes the Secretary of Agriculture to make proper regulations for carrying into effect the terms of the Act. The Secretary of Agriculture promulgated a set of regulations. No question is made that either the Act or the regulations contain any provision which was not required by the terms of the treaty. They both conflict, however, with some of the provisions of the game laws of the State of Missouri.

QUESTION INVOLVED.

The sole question involved is whether the Act of Congress, the enforcement of which is sought to be enjoined, is a valid Act.

CONTENTIONS OF APPELLANT.

The appellant contends that—

1. In the absence of a treaty, the protection of game within a State is exclusively within the legislative powers of the State and wholly without the power of Congress.

2. The right of a State to regulate the taking of game within its borders can not be curtailed by a treaty between this country and a foreign country.

CONTENTIONS OF THE APPELLEE.

On the other hand, it is contended that—

1. Even if no treaty had been made on the subject, Congress has power to protect migratory birds which are in one State or country during a part of the year and in another during the remainder of the year.

2. Even if Congress, in the absence of a treaty, would be without power to enact legislation of this kind, the protection of migratory birds is a proper matter of negotiation between the countries interested in such birds, and a treaty made for the purpose of affording such protection is operative throughout the United States and supersedes State laws on the same subject.

BRIEF.

I.

The Government insists, strenuously, as it is insisting in another case now before this court, that a State cannot become a litigant merely for the purpose of challenging the constitutionality of a criminal law of the United States operating upon those who are citizens both of the United States and of the State. In this case, however, the State grounds its right to sue upon the allegation that, as trustee for all its people, it is the owner of the game and wild birds within its borders. In substance, therefore, it is charged that the Act assailed infringes the property rights of the States, and the Government is not disposed to question the right of the State of Missouri to call in question the validity of

this Act of Congress and invoke the decision of the Federal courts.

II.

THE ACT OF 1913, INVOLVED IN THE SHAUVER CASE, WAS A CONSTITUTIONAL EXERTION OF POWER BY CONGRESS. THE PRESENT ACT WOULD, THEREFORE, BE VALID, EVEN IF ITS PROVISIONS HAD NOT BEEN ENACTED FOR THE PURPOSE OF GIVING EFFECT TO A TREATY.

While the power of the Federal Government to protect by regulating the killing of migratory birds is so clearly included in the treaty-making power that it can scarcely be necessary in this case to determine what power Congress would have over this subject, in the absence of a treaty, it is insisted that, independent of the treaty, there was ample power to enact the legislation now in question.

This contention rests upon two propositions:

1. A migratory bird law of this kind is authorized by the second paragraph of section 3 of Article IV of the Constitution, which provides that—

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.

2. Such a migratory bird law is authorized under the grant to Congress in paragraph 3 of Section 8 of Article I of the Constitution of power—

> To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

The views of the Government in support of these two propositions were clearly and exhaustively set

out in the brief filed by former Solicitor General Davis and former Assistant Attorney General Underwood in the *Shauver* case, *supra*, at the October term, 1915. After a careful perusal of this brief and a study of the questions involved, it can scarcely be hoped to present the case more forcibly than it was then presented. The arguments contained in that brief, therefore, will be printed as Appendix A to this brief and as the Government's argument in support of the two propositions above set out. There will likewise be reprinted from that brief as Appendix B certain excerpts from official publications of the Department of Agriculture and from writings of ornithologists of recognized authority, showing the value of migratory game and insectivorous birds and the necessity for their protection.

The arguments on this question have been further elaborated in a brief which will be filed in this case by Mr. Louis Marshall as amicus curiae.

III.

THE CONSTITUTION EXPRESSLY GRANTS TO CONGRESS THE POWER TO ENACT SUCH LAWS AS MAY BE NECESSARY TO GIVE EFFECT TO TREATIES.

The court below held that, wholly aside from all other considerations, the legislation in question is valid because enacted to put in effect a treaty. Rec., p. 7; 258 Fed. 479.

Two other District Courts have made the same ruling. *United States* v. *Thompson*, 258 Fed. 257; *United States* v. *Rockefeller*, 260 Fed. 346.

In all three of these cases the court gave to the question involved the most careful consideration, and rendered exhaustive opinions. The three opinions delivered in these cases so fully and clearly cover the case that what is said in this brief can be little more than a restatement of what these three learned judges have so well said. Their decisions sustain the legislation in question as being the exertion of a power not merely implied but expressly conferred upon Congress by the Constitution.

No one doubts that the Federal Government possesses the power to make treaties. Article II, Section 2, Clause 2 of the Constitution, in enumerating the powers of the President, provides that—

> He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur.

It is equally clear that whatever treaty-making power this country possesses is vested exclusively in the Federal Government, for Article I, Section 10, Clause 1 of the Constitution provides that—

> No State shall enter into any Treaty, Alliance, or Confederation.

The effect to be given a treaty is determined by Article VI, Clause 2 of the Constitution, which provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the

> United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

What we are dealing with now, however, is an act of Congress creating criminal offenses. It is, of course, conceded that Congress has no legislative powers except such as have been expressly, or by necessary implication, conferred by the Constitution. These legislative powers are enumerated in Section 8 of Article I, and the concluding paragraph of that Section is:

> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Since, as shown above, the power to make treaties is conferred upon the President and the Senate, there is here a power *expressly* given to the Congress to make all laws which shall be necessary and proper for carrying into execution any treaty lawfully made by the President and ratified by the Senate. Such a treaty becomes a part of the supreme law of the land, and, being so, Congress has the power to enact legislation necessary to carry into effect its provisions.

The supreme law of the land and of all the States is the Constitution of the United States and the laws constitutionally enacted by Congress and treaties

made under the authority of the United States together with the necessary laws enacted by Congress for carrying into execution such treaties. Necessarily, then, an act of Congress is valid if it is the exertion of one of the powers directly conferred by the Constitution or if its effect is to carry into execution a treaty made under the authority conferred by the Constitution upon the President and the Senate. It follows that if the effect of an act of Congress is to put into execution a valid treaty, the act itself is valid. Such legislation has always been recognized by the courts as clearly within the power of Congress.

In *Baldwin* v. *Franks*, 120 U. S. 678, the question was whether certain conspiracy statutes authorized an indictment for forcibly driving a number of Chinese from a place in California where they were living and working, upon the ground that a treaty with China provided that Chinese subjects were to be accorded all the rights, privileges, immunities, and exemptions which are accorded to the citizens and subjects of the most favored nation, and that the Government of the United States should exert all its powers to devise measures to secure to them these rights. It was held that the statutes in question were not broad enough to include the offense charged and could not, therefore, be treated as laws passed to put the treaty into execution. But it was made clear that Congress did have the power, if it chose to do so, to pass criminal laws for the purpose of

punishing those who violated rights secured by the treaty. It was said, at page 683:

> That the United States have power under the Constitution to provide for the punishment of those who are guilty of depriving Chinese subjects of any of the rights, privileges, immunities, or exemptions guaranteed to them by this treaty, we do not doubt.

And in the case of *United States* v. *Jin Fuey Moy*, 241 U. S. 394, Mr. Justice Holmes, in construing a provision of the Act of 1914, relating to the registration and taxing of persons producing and dealing in opium, was careful to show that the provision in question was not required by any treaty between the United States and China, the clear inference being that if it had been so required the statute enacting it would have been entirely valid and the law of the land.

And in *The Chinese Exclusion Case*, 130 U. S. 581, 600, it was said:

> A treaty, it is true, is in its nature a contract between nations and is often merely promissory in its character, requiring legislation to carry its stipulations into effect.

In short, whenever a treaty operates of itself, it is to be regarded in the courts as equivalent to an act of Congress. But if it is only promissory and does not operate of itself, it is then clearly within the province of Congress to enact legislation necessary to put it into effect. *Foster and Elam* v. *Neilson*,

2 Pet. 253, 314; *United States* v. *43 Gallons of Whiskey*, 93 U. S. 188, 196.

Indeed, there can scarcely be a serious contention that Congress may not enact legislation to put into effect the provisions of any treaty which the President, with the advice and consent of the Senate, may lawfully negotiate, regardless of whether the subject matter is one within or without the general legislative powers of Congress. If, therefore, the bill in this case can be maintained, it must be because the President, in negotiating this treaty, has dealt with a subject matter which is beyond the treaty-making power of the United States. In other words, before the act of Congress can be held to be invalid, it must be held that the protection of birds which migrate from Canada to the United States, remaining in each country but portions of the year, is not a matter which can lawfully become the subject of a treaty between the two governments.

IV.

THE POWER OF THE STATE OVER GAME IS LIMITED BY SUCH POWERS AS HAVE BEEN CONFERRED UPON THE FEDERAL GOVERNMENT.

While a State, as trustee for its people, owns the game within its borders, its power to protect the same by regulating hunting and fishing is not unlimited. The leading case establishing the rights of the States in game is *Geer* v. *Connecticut*, 161 U. S. 519. But in that case it was said, at page 528:

> It is also certain that the power which the colonies thus possessed passed to the States

with the separation from the mother country, and remains in them at the present day, in so far as its exercise may be not incompatible with, or restrained by, the rights conveyed to the Federal Government by the Constitution.

V.

THE POWER OF CONGRESS TO LEGISLATE TO MAKE TREATIES EFFECTIVE IS NOT LIMITED TO THE SUBJECTS WITH RESPECT TO WHICH IT IS EMPOWERED TO LEGISLATE IN PURELY DOMESTIC AFFAIRS.

Speaking generally, it may be said that, under our form of government, matters of purely local concern are left to the control of State or local authorities, and matters of national concern are committed to the Federal Government. It is also true that there are two classes of national matters with which the Federal Government deals. There are many national questions affecting alone this Government or the people of the United States with which the Federal Government deals. With respect to this class of questions the line of demarcation between the powers of the State governments and those of the Federal Government is clearly marked by the Constitution. The Federal Government has only such powers of legislation as are delegated to it expressly or by necessary implication. All other powers of legislation are reserved to the States by the people thereof.

But when we come to deal with national questions affecting the interests not only of our own country but of other countries as well, we confront

a different situation. At home, we are citizens of dual sovereignties, each supreme within its own sphere. But, in our intercourse with foreign nations, we are one people and one nation. In our relations to foreign countries and their subjects or citizens, our Federal Government is one Government and is invested with the powers which belong to independent nations and which the several States would possess, if separate nations, and the exercise of these powers can be invoked for the maintenance of independence and security throughout the entire country. In war we are one people. In making peace we are one people. In all our commercial relations we are one people. And in respect to all such matters we are but one Government. That Government is invested with power over all the foreign relations of the country—war, peace, and negotiations and intercourse with other nations. *Cohens* v. *Virginia*, 6 Wheat. 264, 413; *Knox* v. *Lee*, 12 Wall. 457, 555; *The Chinese Exclusion Case*, 130 U. S. 581, 604.

In regulating or controlling purely domestic matters, the Government acts through legislation by Congress, and the limits within which the Congress may legislate are fixed by the Constitution. But, manifestly, when the Government must deal with matters in which, not this country alone, but a foreign nation is interested, an act of Congress is wholly inadequate because in no way binding upon the foreign country. Such matters can be settled and controlled only through agreements between the

two Governments. The assent and participation of a foreign government is necessary. It was for the purpose of enabling our Government to deal with matters of this kind that the treaty-making power was by the States conferred upon the Federal Government and, by their own agreement, prohibited to be exercised by the States. In negotiating a treaty, the Government is dealing with a foreign government. For that purpose, as has been seen, there is but one American Nation with one Government, and that is the Federal Government. In exercising the treaty-making power, the Federal Government acts for the entire American people, whether we regard them as citizens of the United States or as citizens of the several States, and likewise for every State. As said by this court in *Hauenstein* v. *Lynham*, 100 U. S. 483, 490:

> If the National Government has not the power to do what is done by such treaties, it can not be done at all, for the States are expressly forbidden to "enter into any treaty, alliance, or confederation."

It follows that there is no way to settle any question n which a foreign government is interested on one side, and either the United States or any of the States of the Union on the other, except through the negotiations of a treaty between the foreign government and the United States.

Since, as seen above, the power was expressly granted to Congress to enact legislation necessary and proper to put into execution a treaty, the validity of

such legislation can not depend upon whether its subject matter is included within the general legislative powers of Congress. Rather, it depends upon whether the treaty which is being enforced is within the treaty-making power of the United States.

Thus, Congress, acting independently, manifestly would have no power to establish a court with jurisdiction to sit and try cases in a foreign country. This could not, in any event, be done without the consent of the foreign country. But it has long been the practice of nations to give this consent through treaties, and, where treaties have provided for them, Congress has repeatedly authorized the establishment of such courts. Speaking of the power of our Government to provide for such tribunals, this court has said:

> It can, equally with any of the former or present governments of Europe, make treaties providing for the exercise of judicial authority in other countries by its officers appointed to reside therein. (*In re Ross*, 140 U. S. 453, 463.)

In the exertion of its ordinary legislative powers, Congress can clothe no court with jurisdiction to try accused persons contrary to the constitutional guaranties such as an indictment or trial by jury. But, as held in the case just cited, when, as a result of a treaty, our consular or other officers located in foreign governments are given judicial power, trials held before them are not subject to such constitutional guaranties.

VI.

THE POWER OF THE FEDERAL GOVERNMENT TO MAKE AND ENFORCE TREATIES IS NOT A LIMITATION ON THE RESERVED POWERS OF THE STATES BUT IS THE EXERCISE OF A POWER NOT RESERVED TO THE STATES UNDER THE TENTH AMENDMENT, BEING BOTH EXPRESSLY GRANTED TO THE UNITED STATES AND PROHIBITED TO THE STATES.

By the Constitution the complete and unrestricted treaty-making power possessed by the States is expressly granted to the United States to be exercised by the President and Senate.

The exercise of such power is expressly prohibited to the States. Therefore, except as restrained by prohibitions contained in other clauses of the Constitution, the entire treaty-making power of the States was vested in the United States when that instrument was adopted in 1788.

Amendment X (thereafter adopted) reserves to the States or the people all powers not granted to the United States nor prohibited to the States.

As the treaty powers had been, as above stated, both granted to the United States and prohibited to the States, they were expressly excepted from the reservations of the Tenth Amendment, and it is wholly irrelevant.

A treaty made by the treaty-making power does not derogate from the power of any State. It is an exercise of the treaty-making power of such State in conjunction with the like powers of all of the States by their common government.

By their accession to the Constitution, each State has also covenanted that the treaties thus made shall be laws superior in obligation to the Constitution and laws of each State.

So far from the regulation by treaty of matters in which a State and a foreign country have an interest, being in derogation of state rights, because the subject matter is one which the state government could control internally, or in its relations with the other States of the Union, such regulation of the same matter in relation to a foreign country by a treaty made under the Constitution, is the exercise for the State of its power in the way and through the agency it has appointed in adopting the Constitution of the United States.

It is undoubtedly true that, generally, matters of a purely local nature are reserved for the legislative power of the States. But just what these reserved powers are depends upon the extent to which powers, either expressly or by necessary implication, are conferred upon the Federal Government. The police powers are those most generally regarded as having been reserved to the States. But, if the full exertion of any power conferred upon the Federal Government requires the exercise of police powers within the States, such powers may be exercised to the extent necessary, although they may involve an interference with what would otherwise lie exclusively within the province of the State. As said by Judge Trieber in *United States* v. *Thompson*, 258

Fed. 257, 264, in sustaining the statute now under consideration:

> Even in matters of a purely local nature, Congress, if the Constitution grants it plenary powers over the subject, may exercise what is akin to the police power, a power ordinarily reserved to the States. Thus, under the commerce clause of the Constitution, many acts of Congress have been sustained. The White Slavery Act (Act June 25, 1910, c. 395, 36 Stat. 825), *Hoke* v. *United States*, 227 U. S. 308; the Food and Drugs Act (act June 30, 1906, c. 3915, 34 Stat. 768), *Seven Cases* v. *United States*, 239 U. S. 510; the Webb-Kenyon Act (act March 1, 1913, c. 90, 37 Stat. 699), *Clarke Distilling Co.* v. *Western Maryland Railway Co.*, 242 U. S. 311. Under the taxing power, acts of Congress have been sustained which in effect deprived the States of some of their powers. *Veazie Bank* v. *Fenno*, 75 U. S. (8 Wall.) 533; *McCray* v. *United States*, 195 U. S. 27; *Flint* v. *Stone Tracy Co.*, 220 U. S. 107.

The treaty-making power is expressly conferred upon the President and the Senate. The power to enact laws necessary to make treaties effective is just as expressly conferred upon Congress. That the police or other powers of the States cannot be interposed as an obstacle to the exertion of these Federal powers has been too often decided to now admit of doubt. On the contrary, the treaty-making power of the Federal Government is a limitation upon the powers of the States, and no State has any reserved

power as against an exercise of it not forbidden by the Constitution.

Certainly, nothing can be said to be more exclusively within the powers of a State than the enactment of ordinary criminal laws for the purpose of maintaining the peace, and for similar purposes, and the enforcement of these laws in its own courts. Yet it has long been the practice of the Federal Government, without consulting the States, to enter into treaties with foreign countries providing that their consular officers in this country shall have jurisdiction to try those accused of certain offenses committed on board their merchant vessels within the ports of any of the States, although such offenses are punishable under the ordinary criminal laws of the States. The States are thus, by virtue of treaties, deprived of a part of their ordinary police powers and of the right to punish persons violating their local laws. Such treaties, however, have always been held valid and superior to the State laws. Speaking of such a treaty and the right of a consul to try accused persons for offenses so committed in a harbor of the State of New Jersey it was said:

> The treaty is part of the supreme law of the United States, and has the same force and effect in New Jersey that it is entitled to elsewhere. If it gives the consul of Belgium exclusive jurisdiction over the offense which it is alleged has been committed within the territory of New Jersey, we see no reason why he may not enforce his rights under the treaty

> by writ of *habeas corpus* in any proper court of the United States. (*Wildenhus's Case*, 120 U. S. 1, 17.)

In that case, upon an examination of the treaty, the court held that the particular offense charged was not within its terms, and hence denied the writ of habeas corpus. But, as seen above, the power of the United States, by a treaty with Belgium, to supersede the laws of the State of New Jersey and commit the trials of cases which would otherwise be within the jurisdiction of the State courts to foreign consuls was fully recognized.

Another thing which is especially within the general powers residing in the States is the rights of property, including the laws of descent and distribution. All of the States have their own laws on this subject. Usually they provide how and by whom property may be inherited, and quite frequently there have been provisions denying such rights to aliens. But while citizens of other countries would thus be cut off from inheriting property in this country, the same rule would exclude our citizens in other countries. The reciprocal rights in this respect of our citizens and those of foreign countries was early recognized as a proper matter for negotiations between the Governments. Many such treaties have been negotiated and very often their provisions have conflicted with the laws of some of the States. This court, however, has never hesitated to hold that this, being a subject in which the two countries had reciprocal interests,

was a proper matter to be dealt with under the treaty-making power. Hence, it has held time and again that any rule established by the law of any State which conflicts with the provisions of such a treaty is changed by the adoption of the treaty, which must be regarded as the supreme law. *Ware* v. *Hylton*, 3 Dall. 199; *Chirac* v. *Chirac*, 2 Wheat. 259, 276; *Geofrey* v. *Riggs*, 133 U. S. 258, 266.

Still another matter exclusively within the power of the States is the right to fix, by statutes of limitation, the time within which actions may be commenced in their courts. Certainly, nothing could be of a more local nature than this, and yet it has been held that the Federal Government may, by treaty with a foreign government, suspend such statutes of limitation so far as the subjects of a foreign country are concerned. *Hopkirk* v. *Bell*, 3 Cranch 453.

Treaties with the Indian Nations, in which there were provisions against introducing intoxicating liquors into territory ceded by the treaties, have been held to be valid and binding even after the ceded territory had been organized into a county of one of the States. *United States* v. *43 Gallons of Whiskey*, 93 U. S. 188.

In the same way, fishing rights secured to Indians in such a treaty have been held beyond the control of the State of which the ceded territory became a part. *United States* v. *Winans*, 198 U. S. 371.

These cases can leave no doubt but that treaties supersede all State laws which are in conflict with them. And the fact that such treaties deal with

matters ordinarily exclusively within the legislative control of the State is unimportant, if the subject matter is one proper for negotiations between the two governments.

As has been seen, the only government in this country having any power to negotiate a treaty is the Federal Government. Obviously, then, in making treaties, it was intended that the Federal Government should act for and represent both the people of the United States and the several States.

Taking the Constitution of the United States as our infallible guide, State legislation is supreme in purely domestic matters when it deals with a subject matter not delegated to the Congress and when it does not contravene any provision of the Constitution, or of any valid treaty made under authority of the United States or of any Act of Congress necessary to put such a treaty into execution. A State law, however, must necessarily give way to a treaty negotiated with a foreign country under the authority of the United States because the Constitution makes the Federal Government the only authorized agent to act in such matters. When, as in this case, a treaty has been negotiated, it is, by the express terms of the Constitution, superior to any State constitution or State law, unless it can be shown that, for some reason, the treaty is one beyond the power of the Federal Government to make. This brings us to inquire into the nature and extent of the treaty-making power of the United States.

VII.

THE TREATY-MAKING POWER OF THE UNITED STATES EMBRACES ALL SUCH POWER AS WOULD HAVE BELONGED TO THE SEVERAL STATES IF THE CONSTITUTION HAD NOT BEEN ADOPTED. IN THE EXERCISE OF THAT POWER THE FEDERAL GOVERNMENT IS THE ACCREDITED AGENT OF BOTH THE PEOPLE OF THE UNITED STATES AND THE STATES THEMSELVES.

The treaty-making power is of the utmost importance to any nation. A treaty is the means through which wars are terminated. Treaties are equally the means through which friendly relations and commercial intercourse with foreign governments are maintained, and are thus most potent factors in preventing war. Before the Federal Government was formed, each State was an independent sovereignty and possessed all the treaty-making powers of any other government. The Constitutional provision as to treaty making is twofold—it confers upon the President and the Senate the power to make treaties and it provides that no State shall have such power. In other words, when each State became a party to the Constitution it agreed that the Federal Government should have the power to make treaties, and, at the same time, it agreed with all the other States that it would refrain from itself making treaties. It is inconceivable that, since the States were to be denied the treaty-making power, the framers of the Constitution intended that the treaty-making power conferred upon the Government which was being created should be less than that possessed by any other independent govern-

ment and less than that possessed by the State conferring it. The very general language used in conferring the power negatives such an intention. What was conferred was obviously that power to negotiate treaties, which is essential if there is to be intercourse between nations.

Again, those representing the States in the Constitutional Convention understood too well the necessity for the exercise of such a power to have been willing to deprive the States of the ample power that they had unless, at least, as full power was to be vested in some other agency. The agency in which they were, by the Constitution, vesting the general powers relating to foreign relations was the new Government of the United States. With respect to foreign nations, it was obviously to the interests of all that we should be able to speak as one nation. It was neither practicable nor desirable that each of the several States should maintain diplomatic relations with other governments.

It must be remembered that every power which was conferred upon the Federal Government was taken from those powers which the State had the right to exercise, and it would seem impossible to construe the two provisions of the Constitution, above referred to, as accomplishing anything short of the transfer of all the treaty-making power which the several States had to the new Federal Government, and so this court has said:

> That the treaty-making power has been surrendered by the States and given to the United

States is unquestionable. It is true, also, that the treaties made by the United States and in force are part of the supreme law of the land, and that they are as binding within the territorial limits of the States as they are elsewhere throughout the dominion of the United States. (*Baldwin* v. *Franks*, 120 U. S. 678, 682–683.)

When the Constitution was formed, there was a distribution of the powers of government and the selection of agencies for the exercise of these powers. The people of the United States and of the several States agreed that, as to certain matters, their sovereignty should be exercised through the agency of State governments, and that, as to others, this sovereignty should be exercised through the agency of the Federal Government. The making of treaties falls within the latter class. When the United States Government, therefore, negotiates a treaty, it acts as the agent of all the people. When the matters dealt with are matters affecting the interests of a particular State or its citizens, it acts as the accredited agent of the State or its people. It is for this reason that a treaty is, by the Constitution, made superior to any legislation which the States may enact. It has been made the law of the land by that agency designated by the Constitution for that purpose.

VIII.

UNSOUNDNESS OF APPELLANT'S CONTENTIONS.

The entire case of the appellant is predicated upon the theory that the power to regulate the killing of game within its borders is one of the powers reserved

to the States, and that to attempt, by treaty, to regulate the killing of migratory birds is an encroachment, by the Federal Government, on these reserved rights.

The fallacy in this theory is obvious when it is remembered that, under the Constitution, we have in this country three classes of laws:

1. State laws, which, in purely local matters not concerning foreign countries or their subjects, are supreme.

2. Laws enacted by Congress, which, in matters purely domestic and not concerning foreign countries and falling within the enumerated powers of Congress, are supreme.

3. Treaties of the United States, and Acts of Congress carrying the same into execution, which, in matters in which foreign countries are concerned, whether also national or local in character, are supreme.

Ordinary acts of Congress, within its enumerated powers, are valid because the power to enact them has been specially delegated. Treaties and laws for their enforcement are likewise valid for the same reason—that is, the power to make the treaties has been specially delegated to the President and the Senate, and the power to enact necessary legislation to carry them into execution has been just as expressly delegated to the Congress. Both classes of national laws, therefore, involve the exercise of delegated and enumerated powers.

Originally, all the powers inherent in sovereignty belonged to the States or the people thereof. All these powers are still in the States or the people thereof, except such as have been especially delegated to some other agency. There are, however, two classes of delegated powers. Certain enumerated powers were delegated and Congress was made the agent for their exercise, because it was believed that the interests of the whole people would be best promoted through their exercise by the National Government. Another class of powers is likewise delegated and the treaty-making power of the United States established as the agent for their exercise, in order that, in all matters in which the assent or participation of a foreign country is necessary, this country may act as one nation. It follows that to ascertain what are the reserved powers of the States, we must first deduct those powers which have been delegated to Congress and then likewise deduct the powers which have been delegated to the treaty-making authorities of the United States. The remaining powers are, in the last analysis, the powers reserved for all purposes to the several States or the people thereof.

What has just been said answers completely every contention made by the appellant and serves to distinguish and harmonize with the Government's contention all the authorities cited in the brief. It is said:

> Our Government had no prototype in history. The Federal Government and the States are separate and distinct sovereignties. The

> one, within the sphere of its delegated powers is supreme; the other, within the sphere of its undelegated and reserved powers, is no less supreme. It was never intended that the States should be shorn of their sovereignty in internal affairs.

There is no quarrel with this statement as far as it goes. It has, however, no significance against the Government's contention in this case, for the reason that the power to make and enforce treaties is expressly conferred upon the Federal Government, and is therefore within the sphere of its delegated powers. It is also said:

> Under the ancient law, feudal law, and the common law in England the absolute control of wild game was an attribute of government and a necessary incident of sovereignty. When, therefore, the United States Colonies became "free and independent States" with full power to do all "acts and things which independent States may of right do," the power to control the taking of wild game passed to the States.

This is true, and before the adoption of the Constitution it can not be doubted that each State could not only enact such laws as it deemed necessary for the protection of game within its borders, but could, likewise, enter into a treaty with any other State or foreign country for the protection of migratory game which remained within its borders only a portion of the year. After the adoption of the Constitution, however, as said in *Geer* v. *Connecticut*, 161

U. S. 519, 528, this power remained in the States only "in so far as its exercise may be not incompatible with, or restrained by, the rights conveyed to the Federal Government by the Constitution." But if the protection of migratory game is a proper subject matter for treaties between independent nations, the power to secure this protection was expressly conferred upon the Federal Government as a part of the treaty-making power. Again it is said:

> Missouri, upon her admission to the Union, became entitled to and possessed of all the rights and dominion and sovereignty which belonged to the original States. She was admitted, and could be admitted, only on the same footing with them. Equality of constitutional right and power is the condition of all the States of the Union, old and new.

This is undoubtedly sound, but it, of course, implies that Missouri has no more power than any other State. When she was admitted to the Union, she consented to be deprived of the exercise of all the powers of the exercise of which the original States had deprived themselves by the adoption of the Constitution. She, like all the other States, has agreed that whatever treaty-making power she had shall now be exercised for her and belong to the Federal Government. Like all the other States, she has no power to enter into treaties for the protection of migratory game, but has agreed that, so far as treaties may be necessary for this purpose, the Federal Government shall have ample power to make them.

165572—20——5

Another proposition announced is:

> This power of the State over wild game within its borders, which "cannot be questioned" and "will not be gainsaid," is derived from the peculiar nature of such property and its common ownership by all the citizens of the State in their collective sovereign capacity. The State in its sovereign capacity is the representative of the people in their common ownership of the wild game within the borders of the State, and holds the same in trust for the benefit of all its people.

Assuming that this is an entirely sound statement as applied to game which remains permanently within a State, and which may be amply protected by local laws, the peculiar nature of its property in *migratory* game, which is in one country during a part of the year and in another during the remainder of the year, makes it impossible for the laws of one State or one country to give ample protection. This can be accomplished only by concert of action on the part of two or more States or countries. This, in the very nature of things, cannot be secured except through the medium of treaties. And the people of the United States and of all the States have agreed that the treaty-making power shall be exclusively in the Federal Government. Again, it is said:

> But the power of the State over wild game within its borders is not dependent solely upon the authority which the State derives from common ownership and the trust for the bene-

> fit of the people; the power of the State to control wild game is a necessary incident of the power of police. The power of police is an attribute of State sovereignty.

But all the powers of police are not reserved to the States. So far as necessary for the full execution of the powers delegated to the Federal Government, they may be exerted by that Government. To the extent that police powers are necessary for the regulation of our relations with foreign governments and for carrying into execution treaties lawfully made, they have been as expressly delegated to the Federal Government as any other power.

Another proposition asserted is:

> The fact that the present act of Congress purports to give effect to a treaty between the United States and Great Britain can not validate such act of Congress when its effect is not only to accomplish that which under the Constitution Congress has no power to do, but also to do that which is forbidden to the entire Federal Government in all or any of its departments under the terms of the Constitution. Any and every treaty must be presumed to be made subject to the rightful powers of the governments concerned, and neither the treaty-making power alone, nor the treaty-making power in conjunction with any or all other departments of the Government, can bind the Government to do that which the Constitution forbids.

This proposition need not be disputed. No provision of the Constitution, however, is pointed out

which forbids the making of any treaty dealing with something which is the proper subject matter of a treaty between two independent nations. It is also said:

> The Federal Government is a government not only of enumerated powers, but it is also a government to which certain powers are denied. Powers denied are not to be implied; they are to be obtained, if obtained at all, from, and in the manner provided by, those who originally granted the enumerated powers, but who at the same time denied other powers—the people.

The treaty-making power, however, is expressly denied not to the Federal Government but to the States, who are forbidden to exercise it. If, therefore, the protection of migratory birds is properly subject matter for a treaty between independent nations, the power to make such a treaty so far from being denied to the Federal Government is expressly conferred upon it.

Again, it is said:

> Among those powers denied to the Federal Government until secured by amendment are those which are "reserved" to the States respectively or to the people. These reserved powers include those purely internal affairs which "concern the lives, liberties, and properties of the people and the internal order, improvement, and prosperity of the State." Without exception wild game has been held to be a part of this mass which is within the exclusive and absolute power of the State. When the power of the States over their

> purely internal affairs is destroyed, the system of government devised by the Constitution is destroyed.

Whatever may be said of this proposition when applied to the ordinary legislative powers of Congress and the legislative powers of the several States, it has no application to the treaty-making power, for the reason that, as shown above, the reserved powers of the State are those powers which remain after deducting from the full powers of sovereignty those which were committed to Congress to be exercised in purely domestic affairs, and also those powers included in the treaty-making power which are necessary for the regulation of our relations with foreign countries. If necessary, in order to secure reciprocal rights for our own citizens residing abroad, or to secure protection which can be obtained only by the action of two governments, the power of the Federal Government to supersede local or State laws by the making of a treaty is expressly conferred by the Constitution.

When all is said, if the protection of migratory game is a proper subject for a treaty between two countries interested; if prior to the transfer to the Federal Government of all the treaty-making power possessed by the States any State could have entered into a treaty for this purpose; there is nothing in any of the authorities cited by appellant which militates against the Government's contention. The question, at last, is whether the protection of migratory game is a proper matter of negotiation between independent governments.

IX.

THE TREATY-MAKING POWER APPLIES TO ALL MATTERS WHICH MAY PROPERLY BE THE SUBJECT OF NEGOTIATIONS BETWEEN THE TWO GOVERNMENTS.

As has been seen, the treaty-making power is conferred by the Constitution in the most general terms. There is no effort to define it, nor is there any limitation expressly imposed upon it. The greatest of all States Rights Advocates, Mr. Calhoun, said this:

> This country within is divided into two distinct sovereignties. Exact enumeration here is necessary to prevent the most dangerous consequences. The enumeration of legislative powers in the Constitution has relation, then, not to the treaty-making power, but to the powers of the States. In our relation to the rest of the world, the case is reversed. Here the States disappear. Divided within, we present, without, the exterior of undivided sovereignty. The wisdom of the Constitution appears conspicuous. When enumeration was needed, there we find the powers enumerated and exactly defined; when not, we do not find what would be vain and pernicious to attempt. Whatever, then, concerns our foreign relations, whatever requires the consent of another nation, belongs to the treaty power—can only be regulated by it; and it is competent to regulate all such subjects, provided—and here are its true limits—such regulations are not inconsistent with the Constitution. If so, they are void. No treaty can alter the fabric

> of our government; nor can it do that which the Constitution has expressly forbidden to be done; nor can it do that differently which is directed to be done in a given mode, and all other modes prohibited. (4 Elliott's Debates, p. 464.)

Precisely the same view was taken by Mr. Justice Story in his work on the Constitution, fifth edition, in section 1508, as follows:

> The power "to make treaties" is by the Constitution general; and of course it embraces all sorts of treaties, for peace or war; for commerce or territory; for alliance or succors; for indenmity for injuries or payment of debts; for the recognition and enforcement of principles of public law; and for any other purposes which the policy or interests of independent sovereigns may dictate in their intercourse with each other. But though the power is thus general and unrestricted, it is not to be so construed as to destroy the fundamental laws of the State. A power given by the Constitution can not be construed to authorize a destruction of other powers given in the same instrument. It must be construed, therefore, in subordination to it; and can not supersede or interfere with any other of its fundamental provisions. Each is equally obligatory, and of paramount authority within its scope; and no one embraces a right to annihilate any other. A treaty to change the organization of the government, or annihilate its sovereignty, to overturn its republican form, or to deprive it of its constitutional

> powers, would be void; because it would destroy, what it was designed merely to fulfill, the will of the people. Whether there are any other restrictions necessarily growing out of the structure of the government, will remain to be considered whenever the exigency shall arise.

It is thus clear that the enumerated powers of Congress merely mark the line of demarcation between the legislative power of Congress and that of the States in dealing with purely domestic affairs. When, however, a matter must be dealt with which requires the consent of another nation, the States disappear and the Federal Government may make any treaty which one of the States could have made if it had not been deprived by the Constitution of its original treaty-making power. The views thus expressed are those which have consistently been followed by this court, and it is believed that no treaty yet made by our Federal Government has ever been declared by its courts to be invalid. The court, it is true, has several times said that there are certain limitations to be implied from the Constitution. The limitations thus suggested, however, relate to matters which can scarcely be said to be the proper subject of negotiations between governments. And it is safe to say that when it is once conceded that a particular matter is one proper for such negotiations the power to make treaties concerning it is unlimited.

In the present case, the effort is to engraft on the treaty-making power a limitation to the effect that

it can not apply to those matters which, as between Congress and the States, belong exclusively to the latter. This power, is not only contrary to the theory that, in making treaties, the Federal Government acts for the States and with authority to bind them, but is directly in conflict with what this court has said. Thus, in the early case of *Ware* v. *Hylton*, 3 Dall. 198, 235, it was said:

> There can be no limitation on the power of the people of the United States. By their authority, the state constitutions were made, and by their authority the constitution of the United States was established; and they had the power to change or abolish the state constitutions, or to make them yield to the general government, and to treaties made by their authority. A treaty can not be the supreme law of the land, that is, of all the United States, if any act of a state legislature can stand in its way. If the constitution of a state (which is the fundamental law of the state, and paramount to its legislature) must give way to a treaty, and fall before it; can it be questioned, whether the less power, an act of the state legislature, must not be prostrate? It is the declared will of the people of the United States, that every treaty made by the authority of the United States, shall be superior to the constitution and laws of any individual state; and their will alone is to decide. If a law of a state, contrary to a treaty, is not void, but voidable only, by a repeal, or nullification by a state legislature, this certain consequence follows, that the will

> of a small part of the United States may control or defeat the will of the whole. The people of America have been pleased to declare, that all treaties made before the establishment of the national constitution, or laws of any of the states, contrary to a treaty, shall be disregarded.

And in *Geofrey* v. *Riggs*, 133 U. S. 258, 266, the court said:

> That the treaty power of the United States extends to all proper subjects of negotiation between our government and the governments of other nations, is clear. It is also clear that the protection which should be afforded to the citizens of one country owning property in another, and the manner in which that property may be transferred, devised or inherited, are fitting subjects for such negotiation and of regulation by mutual stipulations between the two countries. As commercial intercourse increases between different countries the residence of citizens of one country within the territory of the other naturally follows, and the removal of their disability from alienage to hold, transfer and inherit property in such cases tends to promote amicable relations. Such removal has been within the present century the frequent subject of treaty arrangement. The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and

> of that of the States. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States, or a cession of any portion of the territory of the latter, without its consent. *Fort Leavenworth Railroad Co.* v. *Lowe*, 114 U. S. 525, 541. But with these exceptions, it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of the negotiation with a foreign country.

And in *In re Ross*, 140 U. S. 453, 463, it was said:

> The treaty-making power vested in our government extends to all proper subjects of negotiation with foreign governments.

The substance of the matter is that, while, in general, the State has reserved to itself the control of its internal affairs, it has agreed that in all matters in which a foreign government may have an interest, and which may properly be the subject of negotiations with that Government, the Federal Government shall act for it and that any treaty made in pursuance of this authority shall be superior to its own laws, even though relating to its internal affairs.

The ultimate question in this case, then, is whether the protection of migratory birds which remain during a part of the year in Canada and the remainder of the year in the United States is a proper subject of negotiation between this Government and that of Great Britain.

X.

THE PROTECTION OF MIGRATORY GAME IS A PROPER SUBJECT OF NEGOTIATIONS AND TREATIES BETWEEN THE GOVERNMENTS OF THE COUNTRIES INTERESTED IN SUCH GAME.

Whether a treaty with a foreign government by which the United States should agree to certain regulations for the protection of game which remains permanently within the United States would be a valid exercise of the treaty-making power need not now be considered. This case does not present that question. The treaty is limited to regulations for the protection of birds which regularly migrate between the United States and Canada. That this is a matter of very great importance to both countries will not admit of doubt. Game birds are valuable as furnishing food supply. As shown by the data printed in Appendix B of this brief, the importance to the material interests of both countries of preserving insectivorous birds, many of whom are migratory, can scarcely be exaggerated. It is also beyond doubt that, unless controlled by adequate regulations, there will be such destruction of these migratory birds that they will become extinct, to the great damage of both countries. It is obvious that neither country, acting alone, can possibly afford adequate protection against this destruction. No matter how rigid the regulations adopted by the States might be, if the birds during their sojourn in Canada are subject to wholesale destruction, they are likely, in time, to become extinct. They must be protected in both countries, or the protection afforded

will necessarily be inadequate. Such protection can, in the very nature of things, be secured only by negotiations between the two governments.

His Honor, Judge Van Valkenburgh, in the court below, stated his conclusions thus:

> Seals go regularly to their breeding and feeding grounds. Fishes migrate during the spawning season. Migratory birds nest in the north and feed in the south with the regularity of the seasons. The movements of all these forms of life may be computed almost with mathematical precision. Their courses through the water and through the air are almost as well defined as though marked by Old Trails' monuments. Their movements are dictated by neither whim nor caprice, but are impelled by an instinct which inheres in the law of their being. If this be true, what distinction can we draw between the fish which swims through one of the great natural elements and the bird which flies through another? The controlling consideration is the effect upon the mutual interests of the two nations concerned. By this treaty the United States profits by the protection which is accorded such wild fowl in Canada during the nesting and feeding seasons before the migration sets in to the south. Canada gains by the same protection which is thrown about the same birds during their stay within the United States. The people of both countries, of our entire Union and of all the States, benefit by the mutual and reciprocal advantages which accrue from this arrangement. If this be so, then the subject matter comes properly within

> the treaty-making power. If it curtails any right which would otherwise be lodged in an individual State, it does so only through the full and untrammeled exercise of a federal power to negotiate with a foreign government. The conflict of jurisdiction, if one can be said to exist, differs in no respect from that which is experienced in the exercise of any power concededly lodged in the federal government which comes in contact with the ordinary powers of the State over the same subject matter. (Rec., pp. 12–13; 258 Fed. 479, 484).

And in *United States* v. *Rockefeller*, 260 U. S. 346, 347–8, another District Judge has well stated the case thus:

> Fisheries have been the subject of treaties always, and the principles and objects thereof are equally applicable and desirable in relation to migratory birds and other game. So doubtless of air and water, their protection from pollution, their conservation, apportionment, and use. The object of all thereof is to peacefully share those natural resources which are the property of no one till reduced to possession, from which all may take when within their territory, which are alternately found within the territory of the several nations and in places common to all as the high seas, which may be wholly seized and exterminated by one to the great and irreparable damage of all, which in accord may be preserved and enjoyed a blessing to all, but in discord may be annihilated to the injury of all, and which may become legitimate causes for war, to obviate which is one of the most ancient and important objects of treaties.

> * * * Civilized nations have awakened to the value of certain wild life, and to the necessity of cooperation to conserve and perpetuate it. Not otherwise can migratory birds be preserved from extinction. It avails little to protect them at one of their resorts, if they are mercilessly slaughtered at others. If wild ducks, or their eggs and nests, are destroyed on the northern breeding grounds, there will be little sport and profit in duck shooting in the southern fields; and if these birds are exposed to unregulated killing in their winter resorts, there will be few to propagate their kind in the marshes of the north. Their continued existence is beyond the power of separate states and nations. It can be accomplished only by treaty to that end between nations. A state can protect wild life only within its territory; the United States by treaty can protect it everywhere. This treaty tends thereto.

It may be that, while migratory birds are within a State, that State, as trustee for its people, has the same title to them that it has to birds which remain permanently within its borders. But this title is necessarily something of a floating title. When the birds return to Canada, the Government of Canada, as trustee for its people, has exactly the same title that the State has when they are in the United States. Moreover, while the birds are in Canada, the States to which they customarily migrate are still interested in them, because, when they return, its title again attaches. Manifestly, then, the States of the United States are as much interested in the preservation of these birds while in

45

Canada as while in the United States. A State, however, is powerless to protect them except when within its own borders. For the purpose of preserving birds remaining permanently within its territory, the State can pass all necessary laws. But for the protection of migratory birds in which it has an interest, while they are in a foreign country it is powerless. While in the one case, therefore, it resorts to its own legislative power, in the other it must have resort to an exercise of power by the agent which it has agreed shall act for it in negotiating and making treaties with foreign governments. The making and enforcing of such a treaty no more interferes with its internal affairs or its reserved powers than the conferring by treaty of judicial power upon the representatives of a foreign country within one of the States, or the suspending of a State statute of limitation by treaty, or the abrogating of a State law against the inheriting by aliens of property. It is simply an exercise of power which the people of the States, by adopting or acceding to the Constitution, have agreed shall be exercised by the Federal Government for and on behalf of all the States and all the people.

CONCLUSION.

It is respectfully submitted that the judgment of the court below is right and should be affirmed.

WILLIAM L. FRIERSON,
Assistant Attorney General.
ALEX. C. KING,
Solicitor General.

FEBRUARY, 1920.

Appendix A.

THE MIGRATORY BIRD LAW IS AUTHORIZED BY THE SECOND PARAGRAPH OF SECTION 3 OF ARTICLE IV OF THE CONSTITUTION, WHICH PROVIDES: "THE CONGRESS SHALL HAVE POWER TO DISPOSE OF AND MAKE ALL NEEDFUL RULES AND REGULATIONS RESPECTING THE TERRITORY OR OTHER PROPERTY BELONGING TO THE UNITED STATES."

That the ownership of wild game is in the sovereign is a legal principle founded entirely on interpretation given to the common law. In no instance does it rest on any statute or other written declaration of the sovereign.

In this case the question is what sovereign owns the migratory wild life in the United States, whether the Nation as a whole or the several States. On account of the peculiar dual nature of our Government, decisions other than our own are not very helpful in determining conflicts between Federal and State rights and powers. Therefore the decisions of foreign courts will not assist us except in establishing the principle that such ownership is in the sovereign, a conclusion reached by the courts of all nations. (*Geer* v. *Connecticut*, 161 U. S., 519.)

The question of ownership of wild game has arisen in this country only in cases which did not involve claim of ownership in the United States Government or the distinction between migratory animals and those local to a particular State. In several cases the courts have referred to these questions, but in each instance expressly declined to pass on them,

leaving them open for future determination, as was done by this court in the cases of *The Abby Dodge*, 223 U. S., 166, and *Manchester* v. *Massachusetts*, 139 U. S., 240.

The question presented in this case, therefore, is an original one involving the nature and source of property rights, and this decision, being the first of its kind, must declare the common law determining such rights, and may do so upon principle, uninfluenced by supposed authority.

> * * * The first statement presents the principle as certainly as the last. Multiplication of declarations merely adds certainty. For, after all, the common law is but the accumulated expressions of the various judicial tribunals in their efforts to ascertain what is right and just. (*Kansas* v. *Colorado*, 206 U. S., 46, 97.)

The question involved being justiciable and necessarily one of common law, the court in this case must declare "what is right and just" in this particular matter, based upon present-day conditions.

> Constitutional provisions do not change, but their operation extends to new matters as the modes of business and the habits of life of the people vary with each succeeding generation. (*In re Debs*, 158 U. S., 564, 591.)

Let us then examine this common law principle of the sovereign's title to animals *ferœ naturœ* and endeavor to apply it to present conditions in the United States, keeping in mind that the people is the sovereign.

Animals *ferœ naturæ* are common property, belonging, by the law of nature, in common to all citizens of the sovereignty. This has been recognized from time immemorial, not only by common-law writers, but also by the civilians.

Like recognition of the fundamental principle [common ownership] upon which the property in game rests has led to similar history and identical results in the common law of Germany, in the law of Austria, Italy, and, indeed, it may be safely said in the law of all the countries of Europe. (Saint Joseph Concordance, vol. 1, p. 68.) The common law of England also based property in game upon the principle of common ownership, and therefore treated it as subject to governmental authority. (*Geer* v. *Connecticut*, 161 U. S., 519, 526.)

Thus it appears by the common law that a property in those living creatures which, by reason of their swiftness or fierceness, were not naturally under the power of man, was gained by the mere caption or seizure of them, and that all men had an equal right to hunt and kill them. (Vol. 4, Bacon's Abridgment, Title "Game," p. 435.)

Whilst the fundamental principles upon which the common property in game rests have undergone no change, the development of free institutions has led to the recognition of the fact that the power or control lodged in the State, resulting from this common ownership, is to be exercised, like all other powers of government, as a trust for the benefit of the people, and not as a prerogative for the advantage of the Government, as distinct from the people, or for the benefit of private individuals as distinguished from the public good. Therefore, for the purpose of exercising this power, the State, as held by this court in *Martin* v. *Waddell*, 16 Pet., 410, represents its people, and the ownership is that of the people in their united sovereignty. (*Geer* v. *Connecticut*, 161 U. S., 519, 529.)

> Here [in the United States] the sovereign power is in the people, and the principle, founded upon reason and justice, obtains, that by the law of nature every man, of whatever rank or station, has an equal right of taking, for his own use, all creatures fit for food that are wild by nature, so long as he does no injury to another's right. (*Sterling* v. *Jackson*, 69 Mich., 488.)

The property being common to all citizens, each has the same right to its enjoyment. That this right may be safeguarded and rendered available to all, the common law vests the title to animals *feræ naturæ* in the Government, in trust for the people, "in order to protect them from undue destruction, so that the right of the common owners, the public, to reduce to possession may be ultimately efficaciously enjoyed." (*Ohio Oil Co.* v. *Indiana*, 177 U. S., 190, 210.)

The only reason or purpose subserved by so placing the title is that the common property may be protected and controlled. If there is no government which has power to protect, there is no reason for a trustee, and the title, as well as the beneficial ownership, may well rest in the people. The Government's title, therefore, to animals *feræ naturæ* has its source in and depends upon its ability to protect and control same for the benefit of all. This being true, the common law, in case of conflict, will uphold the title of that Government which has the superior power to protect and control such property for the benefit of its common owners.

Let us apply this principle to our peculiar system of governments within a government.

The State, in contradistinction to the United States, has for the benefit of, and in trust for, its people, ownership of all wild animals remaining per-

manently within its territorial limits. Having entire control over such animals, the State can protect and conserve them by its laws for all of its people. From this power of control and protection the common law, as interpreted by both Federal and State courts, has deduced State ownership of animals *ferœ naturæ*.

In the case of migratory wild life, however, the several States have not such control or power over same as renders possible its protection by the States for the benefit of the people. While such animals are on other territory than their own, they have absolutely no power over them and can not enter into treaties with other Governments for their protection or even make agreements concerning the same among themselves, without consent of Congress. For the greater part of the time, a particular State has, therefore, because of express provisions of the Constitution, no power to control or protect migratory wild life. The Federal Government alone can protect and regulate, at all times, animals *ferœ naturæ* remaining permanently within the limits of the United States yet migrating over several States, and is also the only Government which can enter into treaties with foreign countries where such animals migrate beyond the limits of the United States. Therefore, by reasoning from this exclusive power analogous to that which vests title to local game in the State, the common law should declare ownership of migratory birds to be in the United States as trustee for all the people.

> * * * There is a domain which the States can not reach and over which Congress alone has power; *and if such power be exerted to control what the States can not, it is an argument for—not against—its legality.* Its exertion does not encroach upon the juris-

> diction of the States. (*Hoke* v. *United States*, 227 U. S., 308, 321.) [Italics ours.]
>
> Our dual form of Government has its perplexities, State and Nation having different spheres of jurisdiction, as we have said, but it must be kept in mind that we are one people; and the powers reserved to the States and those conferred on the Nation are adapted to be exercised, whether independently or concurrently, to promote the general welfare, material and moral. (*Hoke* v. *United States*, 227 U. S., 308, 322.)
>
> The genius and character of the whole Government seem to be that its action is to be applied to all the external concerns of the Nation, and to those internal concerns which affect the States generally, but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere for the purpose of executing some of the general powers of the Government. (*Gibbons* v. *Ogden*, 9 Wheat., 1, 195.)

This common law interpretation of property rights fits in with our constitutional system of enumerated powers. When the Constitution of the United States was ratified, a new and distinct sovereignty and people were created. This new Government emanated from the people and not from the States as such.

> Its powers are granted by them and are to be exercised *directly on them, and for their benefit.* * * * It is the Government of all; its powers are delegated by all; it represents all and acts for all. (*McCulloch* v. *Maryland*, 4 Wheat., 316, 405.) [Italics ours.]

By ratifying the Constitution, the people expressly delegated to the Federal Government the exclusive right to protect wild life by treaties with foreign nations, and at the same time withdrew from the

States the right, without the consent of Congress, to make among themselves agreements for such purpose, thus vesting in Congress the ultimate control and protection of same. By thus stripping the States of all power to protect migratory wild life for the greater part of the time, and expressly granting such power to the Federal Government, the people, by necessary implication from these express grants and the nature of the property, changed their trustee and vested the title to all migratory animals *ferœ naturæ* in the Federal Government in trust for themselves, the people of the United States and the common owners of such animals.

By analogous reasoning, this court seems to have upheld the constitutionality of a statute enacted for the protection of Indians.

> The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that Government, because it never has existed anywhere else, because the theater of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes. (*United States* v. *Kagama*, 118 U. S., 375, 384–385.)

The principle announced in the *Kagama* case has been repeatedly upheld, and the above excerpt has been quoted with approval by this court in the following cases: *United States* v. *Sandoval*, 231 U. S., 28, 46; *Tiger* v. *Western Investment Co.*, 221 U. S., 286, 312; *Lone Wolf* v. *Hitchcock*, 187 U. S., 553, 566, 567; *Cherokee Nation* v. *Southern Kansas Ry. Co.*, 135 U. S., 641, 655; *United States* v. *Thomas*, 151 U. S.,

577, 586; *Stephens* v. *Cherokee Nation*, 174 U. S., 445, 486.

In this connection see also the opinions in *Downes* v. *Bidwell*, 187 U. S., 244 (especially the concurring opinion, p. 287), and *Jones* v. *United States*, 137 U. S., 202.

The total extinction of three species of birds, including the prolific carrier pigeon, which formerly existed in enormous numbers, as well as the appalling decrease in other species, until now only approximately 10 per cent of their previous number exists (Appendix, p. 35), show the impotency of State protection. The following excerpt from a report to the Legislature of Ohio in 1857 shows how incredible to the legislators of that time would have been the prophecy that the last of these "myriads" would die in 1914, caged as a curiosity in a zoological park. Yet such has been the fate of this now extinct bird:

> The passenger pigeon needs no protection. Wonderfully prolific, having the vast forests of the North as its breeding grounds, traveling hundreds of miles in search of food, it is here to-day and elsewhere to-morrow, and no ordinary destruction can lessen them or be missed from the myriads that are yearly produced.

On the other hand, the remarkable increase since the passage of the Migratory Bird Law, reported by the officials of 40 States of the Union, show the efficiency of Federal protection and control. See Appendix, page 35.

The doctrine that the United States own migratory wild game is not contrary to existing authority. In the cases cited to establish the claim that wild game belongs exclusively to the several States, we find that in each either the animals were local to the particular

State, as in the cases involving the taking of oysters and sponges, or the question of their migratory character was not raised.

Furthermore, we find that the decisions of this court have expressly left open the question of ownership and regulation of migratory wild life by the Federal Government.

> Again, in *Manchester* v. *Massachusetts*, 139 U. S., 240, in upholding a statute of the State of Massachusetts, regulating the taking of menhaden in Buzzards Bay, the doctrine of the case just cited was expressly reiterated. True, further in that case, probably having in mind the declaration made in the opinion in the *McCready* case, that fish running within the tidewaters of the several States were subject to State ownership "so far as they are capable of ownership while so running," the *question was reserved as to whether or not Congress would have the right to control the menhaden fisheries.* But here also for the reason that the question arising relates only to sponges growing on the soil covered by water *we are not concerned with the subject of running fish and the extent of State and National power over such subject.* (*The Abby Dodge*, 223 U. S., 166, 174–175.) [Italics ours.]

From the above quotation, in which all of the pertinent decisions of this court were referred to, it will be seen that the court, in their latest expression on the subject, took pains to say that this question had not been decided and would be left open for future determination.

But even had the courts decided that migratory animals were subject to State jurisdiction, nevertheless such decisions would still not be hostile to the present argument. Until the enactment of this law Congress had not assumed control over the subject,

and it was therefore entirely within the police power of the several States to pass laws for the protection of wild game until Congress should act.

> * * * But there is no occasion to consider the power of the United States to regulate or control, either by treaty or legislation, the fisheries in these waters, because there are no existing treaties or acts of Congress which relate to the menhaden fisheries within such a bay. * * * and the subject is one which a State may well be permitted to regulate within its territory, in the absence of any regulation by the United States. * * * if it [the Federal Government] does not assert by affirmative legislation its right or will to assume the control of menhaden fisheries in such bays, the right to control such fisheries must remain with the State which contains such bays. (*Manchester* v. *Massachusetts*, 139 U. S., 240, 264, 265, 266.)
>
> Aside from the authority of the State, derived from the common ownership of game and the trust for the benefit of its people which the State exercises in relation thereto, there is another view of the power of the State in regard to the property in game, which is equally conclusive. The right to preserve game flows from the undoubted existence in the State of a police power to that end, which may be none the less efficiently called into play, because by doing so interstate commerce may be remotely and indirectly affected. (*Kidd* v. *Pearson*, 128 U. S., 1; *Hall* v. *De Cuir*, 95 U. S., 485; *Sherlock* v. *Alling*, 93 U. S., 99, 103; *Gibbons* v. *Ogden*, 9 Wheat., 1.) Indeed, the source of the police power as to game birds (like those covered by the statute here called in question) flows from the duty of the State to preserve for its people a valuable food supply. (*Geer* v. *Connecticut*, 161 U. S., 519, 534.)

> While the State can not, under cover of exerting its police power, directly regulate or burden interstate commerce, a police regulation which has real relation to the proper protection of the people, and is reasonable in its terms, and does not conflict with any valid act of Congress, is not unconstitutional because it may incidentally affect interstate commerce. (*Savage* v. *Jones*, 225 U. S., 501, headnote 7.)

In the *Geer* case the court held that the State has the power to protect wild game subject to its jurisdiction by the exercise of the police power and also by virtue of its common ownership of such game. It is not claimed in this argument, however, that the United States have the right to protect migratory wild birds by the exercise of a general police power independent of the ownership or authority granted by the Constitution, such as was declared, in the *Kansas-Colorado case*, not to exist in the Federal Government; but it is maintained that the United States have such power by virtue of their ownership of migratory birds as trustee for all the people of the United States. It is a question of ownership of property and not of extending the power to "make all needful rules and regulations respecting the territory" of the United States to embrace "legislative control over the States." The act merely provides "needful rules and regulations" respecting *property* of the United States within the territory of the several States, a power daily exercised by the Federal Government.

While there are many features of this case that appeal to the esthetic and one longs to see upheld a law that will conserve for the future the fascinating creatures which charm us with their song and beauty, amaze us by their marvelous skill and wonderful flight, or delight us in the chase, nevertheless, the case is not here because of these features, but be-

cause property rights of great economic value are involved, the property in birds which afford annually a food supply valued at millions of dollars (Appendix, p. 36), and which by their policing of the air save our forests, our animals, and our crops.

> It was clearly shown that the economic aspect was twofold. The game birds yield a considerable and an important amount of highly valued food, and if given adequate protection will be a constant valuable asset. The insectivorous migratory birds destroy annually thousands of tons of noxious weed seed and billions of harmful insects. These birds are the deadliest foe yet found of the boll weevil, the gypsy and brown-tailed moths, and other like pests. The yearly value of a meadow lark in a 10-acre field of cotton, corn, or wheat is reckoned by experts at $5. The damage done to growing crops in the United States by insects each year is estimated, by those who have made the matter a special study, at about $800,000,000. (House Committee Report on Migratory Bird Bill, 49th Cong. Rec., pt. 2, p. 1485.)

Excerpts from official publications of the Department of Agriculture, and treatises of ornithologists of recognized authority, quoted in the appendix (pp. 23–34), show how great is the insect peril and how dependent we are upon the migratory insectivorous birds for protection against it.

Migratory birds, therefore, being property of the United States, Congress, by virtue of the authority granted by the Constitution to "make all needful rules and regulations respecting the territory or other property belonging to the United States," may pass any laws it may deem proper for the protection of same, though such laws may have the quality of police

regulations. (*Hoke* v. *United States*, 227 U. S., 308, 323.)

> All the public lands of the Nation are held in trust for the people of the whole country. (*United States* v. *Trinidad Coal Company*, 137 U. S., 160.) And it is not for the courts to say how that trust shall be administered. That is for Congress to determine. (*Light* v. *United States*, 220 U. S., 523, 537.)
>
> The general Government doubtless has a power over its own property analogous to the police power of the several States, and the extent to which it may go in the exercise of such power is measured by the exigencies of the particular case. (*Camfield* v. *United States*, 167 U. S., 518, 525.)

THE MIGRATORY BIRD LAW IS AUTHORIZED UNDER THE GRANT TO CONGRESS IN PARAGRAPH THREE OF SECTION EIGHT OF ARTICLE ONE OF THE CONSTITUTION OF POWER "TO REGULATE COMMERCE WITH FOREIGN NATIONS, AND AMONG THE SEVERAL STATES, AND WITH THE INDIAN TRIBES."

Should it be admitted, for the purposes of this argument, that the title to migratory birds while actually within a State is in such State, then of necessity title thereto must pass from one State to another as such birds cross the boundary line between the States. Thus a migratory bird flying from one State into another, under such theory, passes from the ownership of the former into that of the latter State.

If this be true, a thing recognized by the courts as an article of commerce when passing between individuals passes from the ownership of individuals in their collective capacity to other individuals in their collective capacity, the ownership of the States

being merely ownership in trust for their respective citizens.

Such transmission of title in connection with the actual passage of the birds from one State to another constitutes, it is submitted, interstate commerce within the meaning of the Constitution.

It is to be remarked that the Constitution does not define the word "commerce." Likewise, the courts, no doubt purposely, have refused to attempt an all-inclusive definition of this word, but have contented themselves with deciding as occasions arose whether the facts of the case before them constituted commerce within the meaning of the Constitution. Wisely have they done so, for human mind can not foresee all the possible combinations of facts which might properly constitute commerce.

The Supreme Court have said, however, that—

> Commerce, as defined by this court, means something more than traffic—*it is intercourse;* and the power committed to Congress to regulate commerce is exercised by prescribing rules for carrying on that intercourse. (*Lottery Case*, 188 U. S., 321, 348.)
>
> Commerce was defined in *Gibbons* v. *Ogden*, 9 Wheat., 1, 189, to be "*intercourse*," and the thousands of people who daily pass and repass over this bridge may be as truly said to be engaged in commerce as if they were shipping cargoes of merchandise from New York to Liverpool. (*Covington, etc., Bridge Co.* v. *Kentucky*, 154 U. S., 204, 218.)
>
> Commerce with foreign countries and among the States, strictly considered, consists in *intercourse* and traffic, including in these terms navigation and the transportation and *transit of persons and property*, as well as the purchase, sale, and exchange of commodities. (*County of Mobile* v. *Kimball*, 102 U. S., 691, 702.) [All italics ours.]

From the last quotation it will be seen that the mere "transit" of persons or property, independently of purchase, sale, or exchange, was such intercourse as falls within the meaning of the word "commerce." "Transit" means "the act of passing over or through; passage." (New Standard Dictionary.) The word "commerce" as used in the Constitution and defined by this court is sufficiently comprehensive to include the periodical and systematic "passage" of migratory birds among the States. Therefore, under the power to regulate commerce among the States, Congress was acting entirely within its authority in passing this act for the protection of migratory birds.

It is under definitions like the above that such phenomena as purely social intercourse over the telephone or telegraph between citizens of different States (*Telegraph Co.* v. *Texas*, 105 U. S., 460; *Western Union Tel. Co.* v. *Milling Co.*, 218 U. S., 406); or the mere passage, for social intercourse or pleasure, of a person over an interstate bridge (*Covington, etc., Bridge Co.* v. *Kentucky*, 154 U. S., 204, 218); or the driving of sheep on foot from one State into another (*Kelley* v. *Rhoads*, 188 U. S., 1), are held to constitute interstate commerce within the meaning of the Constitution. The cases of *Pedersen* v. *Del., L. & W. Railroad*, 229 U. S., 146; *Hoke* v. *United States*, 227 U. S., 308; *Hipolite Egg Co.* v. *United States*, 220 U. S., 45; *McDermott* v. *Wisconsin*, 228 U. S., 115, are other examples of the liberal construction always given by this court to the commerce clause of the Constitution.

It is sought now merely to extend the principle of these cases to new facts. To illustrate this identity in principle, suppose the ranch of a cattle owner is

situated wholly within a quarantined State but near the boundary line between two States, and that his cattle, affected with the foot-and-mouth disease, may roam at will, on account of liberal stock laws, over grazing lands located in the two States. Undoubtedly, under *Kelley* v. *Rhoads*, 188 U. S., 1, the Federal Government could prevent the owner from driving diseased cattle from the quarantined State into the other. It is submitted that the fact that the same cattle cross the quarantine line of their own volition instead of that of their owner does not so change their status as participants in interstate intercourse as to destroy the power of Congress to prevent their crossing the State line.

If the Federal Government may prevent such intercourse between States because it is harmful, under the same principle beneficial intercourse between the States may be safeguarded.

It would seem, therefore, under the theory of State ownership, that the facts in this case, especially since there is a transmission of title, as well as a "transit" or "passage" of property from one State to another, bring the case within the commerce clause of the Constitution.

Appendix B.

EXCERPTS FROM OFFICIAL PUBLICATIONS OF THE DEPARTMENT OF AGRICULTURE AND FROM WRITINGS OF ORNITHOLOGISTS OF RECOGNIZED AUTHORITY, SHOWING THE VALUE OF MIGRATORY GAME AND INSECTIVOROUS BIRDS AND NECESSITY FOR THEIR PROTECTION.

I.

VALUE OF INSECTIVOROUS BIRDS.

THE INSECT PERIL.

Few people know how enormous is the number of insect species or how amazing is their power of multiplication. The number of insect species is greater by far than that of the species of all other living creatures combined. * * *

The fecundity of certain insect forms is astounding, the numbers bred reaching such prodigious proportions as to be almost beyond belief. Riley once computed that the hop aphis, developing 13 generations in a single year, would, if unchecked to the end of the twelfth generation, have multiplied to the inconceivable number of ten sextillions of individuals. * * *

Kirkland has computed that one pair of gypsy moths, if unchecked, would produce enough progeny in eight years to destroy all the foliage in the United States.

* * * * *

The voracity of insects is almost as astounding as their power of reproduction. The daily ration in leaves of a caterpillar is equal to twice its own weight.

If a horse were to feed at the same rate, he would have to eat a ton of hay every 24 hours.

* * * * *

Some years ago the agriculturists of Hungary, moved to the insane step by ignorance and prejudice, succeeded in getting the sparrow (*Passer domesticus*) doomed to destruction. Within five years the country was overrun with insects, and these same men were crying frantically for the bird to be given back to them, lest they should perish. The sparrow was brought back, and, driving out the hordes of devastating insects, proved the salvation of the country.

* * * * *

In 1895 the ravages of two species of cutworms and some 10 species of locusts produced a famine in the region of Ekaterinburg, which is in Russian Siberia. The local Society of Natural Sciences inquired into the cause which had permitted such numerous propagation of insect pests, and reported that it was due to the almost complete destruction of birds, most of which had been killed and sent abroad by wagon loads for millinery purposes.

Those grass ticks which now make the keeping of most breeds of cattle impossible in Jamaica are not mentioned in the records of the early nineteenth century. The appalling destruction in more recent years of insect-eating birds, chiefly to supply the demands of the millinery market, has led to an inordinate increase of the ticks and to the dying out of all but Indian cattle. This correlation of birds and ticks—to say nothing of mosquitoes and other insect plagues in Jamaica—was put fully and circumstantially before the secretary of state for the colonies by a deputation in 1909.

* * * * *

This worthy [Frederick the Great], in a fit of passion because a flock of sparrows had pecked at some of his cherries, ordered every small bird that could be searched out to be instantly killed. Within two years his cherry trees, though bare of fruit, were weighed down with a splendid crop of caterpillars.

* * * * *

Though I could give a hundred cases similar to the foregoing, I must rely on the few I have cited to show that the wholesale destruction of birds is surely followed by disaster to man. (Value of Birds to Man, by James Buckland, Ann. Rept. Smithsonian Inst., 1913, pp. 439, 440, 441, 442, 448.)

* * * * *

The enormous losses which have occurred in the United States from the destruction of growing crops by insects must seem incredible to those who do not realize how vast are the numbers of insects, how stupendous their power of multiplication, how insatiable their voracity.

* * * * *

In 1854 the loss in New York State alone from the ravages of the insignificant wheat midge (*Contarinia tritici*), as estimated by the secretary of the New York State Agricultural Society, was $15,000,000, whole fields of wheat were left ungarnered. So destructive was this insect in the following years as to stop the raising of white wheat and reduce the value of all wheat lands 40 per cent.

* * * * *

Dr. C. L. Marlatt, of the Bureau of Entomology of the United States Department of Agriculture, who has made careful calculations of the loss still occasioned by the Hessian fly (*Mayetiola destructor*) in

the wheat-growing States, says that in comparatively few years does it cause a loss of less than 10 per cent of the crop. On the valuation of the crop of 1904 this would amount to over $50,000,000. Dr. Marlatt states that in the year 1900 the loss in the wheat-growing States from this tiny midge undoubtedly approached $100,000,000.

The chinch bug (*Blissus leucopterus*) attacks many staple crops, and has been a seriously destructive pest in the Mississippi Valley States for many years, where it injures chiefly wheat and corn. Dr. Shimer in his notes on this insect estimates the loss caused by it in the Mississippi Valley in 1864 as $100,000,000, while Dr. Riley gives the loss in that year as $73,000,000 in Illinois alone.

* * * * *

The Rocky Mountain locust (*Melanoplus spretus*) began to destroy crops as soon as the country it inhabits was settled, and is still injurious. From time to time its enormous flights have traversed a great part of the Mississippi Valley. It reached a maximum of destructiveness from 1874 to 1877, when the total loss from its ravages in Kansas, Nebraska, Iowa, Missouri, and neighboring States, including injury by depression of business and general ruin, was estimated at $200,000,000. * * * (Useful Birds and Their Protection, 4th ed., 1913, Edward H. Forbush, Ornithologist to the Massachusetts Board of Agriculture, pp. 27, 32, 33, 34.)

The gypsy moth (*Porthetria dispar*), a well-known pest of European countries, was introduced into Medford, Mass., by Leopold Trouvelot, in 1868 or 1869. Twenty years later the moths had increased in numbers to such an extent that they were destroying the trees and shrubbery in that section of Medford where they were first liberated.

They swarmed over the houses of the inhabitants, invaded their gardens, and became such a public nuisance that in 1890 the legislature appropriated $50,000 for their extermination. It was learned within the next two years that the moths had spread over 30 towns. The State board of agriculture was given charge of the work in 1891 and over $1,000,000 were expended within the next 10 years in the attempt to exterminate the insect. As at the expiration of that time all the larger moth colonies had been destroyed, the legislature, deeming further expenditures unwise, gave up the work, despite the protest of the Board of Agriculture, and its prediction that a speedy rise of the moth would follow the cessation of concerted effort against it. This prediction has been abundantly fulfilled, and the policy of the board has been fully justified.

Dr. Marlatt, who in 1904 visited the region infested by the moth, reported to the Bureau of Entomology at Washington that the people of the infested district were then fighting the insect at a greater annual cost than that formerly assumed by the State. Since the State gave up the work, a single citizen, Gen. Samuel C. Lawrence, of Medford, has expended over $75,000 to protect the trees and plants on his estate.

Finally, in 1905, the legislature was obliged to renew the fight, and appropriate the sum of $300,000 for work against both this insect and another imported pest, the brown-tail moth (*Euproctis chrysorrhea*), which had been introduced into Somerville some time in the latter part of the nineteenth century.

The State has also been obliged to call on municipalities and individuals to assist in the work of suppressing these moths, at an annual expense to those concerned which exceeds all previous yearly expenditures for this purpose.

These insects have gained a much larger territory than ever before, and thousands of acres of woodland have been attacked by them during the present year (1905), and many pine and other trees have been killed.

The gypsy moth has been found in Rhode Island, Connecticut, and New Hampshire, and the brown-tail moth is also spreading into other States.

The prospect now seems to be that our protective expenses against these two insects, as well as the injury done by them, will increase constantly; and that other States also will be put to similar expense, with no prospect of permanent relief save by such checks as may come, in time, through natural causes. (Useful Birds and Their Protection, Forbush, 4th ed., pp. 38–40.)

According to an official report in the Yearbook of the Department of Agriculture for 1904, the table here shown gives the annual values of farm products in the United States and losses chargeable to insect pests:

Product.	Value.	Percentage of loss.	Amount of loss.
Cereals	$2,000,000,000	10	$200,000,000
Hay	530,000,000	10	53,000,000
Cotton	600,000,000	10	60,000,000
Tobacco	53,000,000	10	5,300,000
Truck crops	265,000,000	20	53,000,000
Sugars	50,000,000	10	5,000,000
Fruits	135,000,000	20	27,000,000
Farm forests	110,000,000	10	11,000,000
Miscellaneous crops	58,000,000	10	5,800,000
Total	3,801,000,000	.....	420,100,000
Animal products	1,750,000,000	10	175,000,000
Natural forests and forest products	.....	.....	100,000,000
Products in storage	.....	.....	100,000,000
Grand total	5,551,000,000	.....	795,100,000

—(Cong. Rec., v. 49, pt. 5, p. 4336.)

Who or what is it that prevents these ravening hordes from overrunning the earth and consuming the food supply of all? It is not man. Man, by the use of mechanically applied poisons, which are expensive, unnatural, and dangerous, is able to repel to an extent the attacks on his orchard and garden. Out in the fields and in the forests he becomes, before any very great irruption of insects, a panic-stricken fugitive. Neither is it disease, or the weather, or animals, or fungi, or parasitic and predaceous insects within their own ranks. However large may be the share of these particular natural agencies in keeping insects in check, experience has shown that it is lamentably insufficient. Then what is it? The bird. Bird life, by reason of its predominating insect diet, is the most indispensable balancing force in nature (Value of Birds to Man, by James Buckland, Ann. Rept. Smithsonian Inst., 1913, p. 440.)

The chickadee returns to her brood about 200 times a day with not less than 25 plant lice each time for the young. It has been found that a cuckoo consumes daily from 50 to 400 caterpillars or their equivalent, while a chickadee will eat from 200 to 500 insects, or up to 4,000 insect or worm eggs. One hundred insects a day is a conservative estimate of the quantity consumed by each individual insectivorous bird. By carefully estimating the birds in several areas it has been found that in Massachusetts there are not less than five insect-eating birds per acre. Thus the State, with its 8,000 square miles, has a useful bird population of not less than 25,600,000 which, for each day's fare, requires not less than the enormous total of 2,560,000,000 insects. Or better to express such figures in common measurements, 120,000 average

insects fill a bushel measure. This means that the daily consumption of chiefly obnoxious insects in Massachusetts is about 21,000 bushels. This estimate is good for above five months in the year—May to September, inclusive—during the remainder of the year the insects, eggs, and larvæ destroyed by the winter, late fall, and early spring migrants will be equivalent to nearly half this quantity.

* * * * *

Birds afford a natural check upon the injurious insects, and wherever forests denote the presence of great numbers of destructive caterpillars or grasses indicate the grubs are destroying the grass roots the birds are not slow to assemble and help restore equilibrium.

* * * * *

The Mexican cotton-boll weevil, that has cost the United States Government so much money, probably about $1,000,000 in direct appropriations, and $5,000,000 to the growers in lessening the crop production, can not be controlled by man, but the following birds are proving almost a specific remedy against the weevil: Six species of orioles, the nighthawk, the martin, the bank swallow, the barn swallow, the rough wing, and the cliff swallow. (The Economic Value of Birds to the Farmer, by R. J. H. de Loach, Cong. Rec., vol. 49, pt. 5, pp. 4332, 4333.)

In his report on Egypt for the year 1912 Lord Kitchener stated that the indiscriminate destruction of bird life had allowed an enormous increase of insect pests, steps for the combating of which were to be taken. Lord Kitchener knew that in spite of the improved methods of fighting insects there was only one step that he could take that would be effective. A khedivial decree was issued forbidding

the catching or killing of, or taking the eggs of, Egypt's insectivorous birds. (Value of Birds to Man, Buckland, Ann. Rept. Smithsonian Inst., 1913, p. 453.)

Shore birds perform an important service by their inroads upon mosquitoes, some of which play so conspicuous a part in the dissemination of diseases. Thus, nine species are known to feed upon mosquitoes, and hundreds of the larvæ or "wigglers" were found in several stomachs. Fifty-three per cent of the food of 28 northern phalaropes from one locality consisted of mosquito larvæ. The insects eaten include the salt-marsh mosquito (*Aedes sollicitans*), for the suppression of which the State of New Jersey has gone to great expense. (Our Vanishing Shorebirds, by W. L. McAtee, Bureau of Biological Survey, Circular No. 79.)

After many years of study, in New Hampshire as well as many other States, of these relations of birds to agriculture, we are convinced that the birds are a most potent factor in making crop production possible, that without them we should be overrun with pests—vertebrate and invertebrate—to an extent of which we now have no conception. (Birds in Their Relation to Man, Weed and Dearborn, p. 4.)

Birds attain their greatest usefulness in the forests, because the conditions there closely approach the primeval. Forest trees have their natural insect foes, to which they give food and shelter, and these insects in turn have their natural enemies among the birds, to which the tree also gives food and shelter. Hence it follows that the existence of each one of these forms of life is dependent upon the existence of the others. * * *

I regard as profoundly true Frank N. Chapman's statement "that it can be clearly demonstrated that

if we should lose our birds we should also lose our forests." (Value of Birds to Man, Buckland, Ann. Rept. Smithsonian Inst., 1913, pp. 446, 447.)

It is especially with regard to insects and plants that the regulative influence of the work of birds is felt. In agriculture experience has taught us that some work, which is indispensable to the productivity of the soil, can be carried on only by winged squads of workmen. * * *

It was in the second half of the nineteenth century, after the development of intensive agriculture, that insects commenced to increase in a most alarming way. In Europe the German farmers and foresters proved that this change was connected with the rapid decrease of birds useful in agriculture, and they were the first to take public action. In 1868 the twenty-sixth general convention of German farmers and foresters recognized the necessity of securing international protection for the birds useful in farming and forestry.

This assembly decided to intrust to Austria-Hungary the duty of taking the initiative and prayed in 1868 that the minister of foreign affairs of these two States take steps toward establishing among all European States an agreement for the protection of birds useful in agriculture and forestry. (Report of the General Convention of the International Institute of Agriculture, December, 1909, pp. 1, 4.)

Birds useful in agriculture, especially insectivorous ones, more particularly the birds enumerated in the list No. 1, annexed to this agreement, which list shall be subject to additions by legislation of each country, shall enjoy absolute protection, in such a way that it shall be forbidden to kill them at any time or in any way whatsoever, or to destroy their nests, eggs, or young. (Translation Article 1 of Agreement of Paris,

entered into in 1902, for the protection of birds useful in agriculture, by Austria-Hungary, Germany, Belgium, Spain, France, Greece, Luxembourg, Monaco, Portugal, Sweden, Norway, and Switzerland.)

II.

VALUE OF GAME BIRDS AND EFFICACY OF MIGRATORY-BIRD LAW.

Formerly migratory waterfowl frequented the United States in enormous numbers, and the supply appeared to be inexhaustible. During the last 75 years, however, the growth of population and the vast increase in the number of hunters, combined with greatly improved firearms and an extraordinary increase in the facilities for rapid transportation to the most remote haunts of wild life, has resulted in an appalling reduction in their numbers. It is believed to be a conservative estimate that the gross number of migratory game birds of all kinds existing to-day in the United States does not exceed 10 per cent of the number which existed here 75 years ago. The decrease has been especially rapid during the last 25 years. During this period some species have become extinct, while others are nearly so.

Thoughtful sportsmen and others interested in our wild life have long realized the impossibility of saving what was left of this great national asset by State action. The rapid progress of our waterfowl toward extinction under State laws was too obvious. To save the dwindling remnant, in 1913 the Federal migratory-bird law was enacted. The law has now been in effect about two years, and an extended inquiry has been made by the Biological Survey as to its effect on migratory game birds. A large number of reports from State and Federal game officials and

private individuals in nearly all of the States of the Union have been received. The replies from a small number of States have been doubtful, usually owing to a lack of definite information on the subject. From 40 of the States, extending from Maine to California and from the Gulf States to the Canadian border, is given unimpeachable evidence of an extraordinary increase in waterfowl during the short period the law has been in effect. The increase is commonly stated, according to the locality, to be from 10 to several hundred per cent, and includes such important species as mallards, black mallards, widgeon, sprigtails, blue-winged teal, green-winged teal, wood ducks, canvasbacks, Canada geese, and swans.

Many of the reports are to the effect that the number of waterfowl remaining to breed exceeds anything seen during the past 10 to 25 years. The results indicate what may be expected from a long period of adequate protection.

The importance of our wild fowl as a national asset is evident when their great aggregate value is considered. The State of Maine estimates the annual income from its game resources at $13,000,000, of which about 5 per cent, or $650,000, can safely be allotted to the returns from migratory wild fowl. Oregon values the annual returns from its game resources at $5,000,000. Of this amount about $1,000,000 may be attributed to migratory wild fowl. It is evident that the actual annual returns from this source in the several States reach a very large amount, and the value of this resource to the Nation amounts to hundreds of millions of dollars. (Weekly News Letter, an official publication of the Department of Agriculture, issue of Sept. 15, 1915.)

III.

THREATENED EXTERMINATION OF BIRDS.

More interest is evinced in the history of the passenger pigeon and its fate than in that of any other North American bird. Its story reads like a romance. Once the most abundant species, in its flights and on its nesting grounds, ever known in any country, ranging over the greater part of the continent of North America in innumerable hordes, the race seems to have disappeared within the past 30 years, leaving no trace.

* * * * *

The last great nesting place of which we have adequate record was in Michigan, in 1878. Prof. H. B. Roney states in the American Field (vol. 10, 1879, pp. 345–347) that the nesting near Petoskey that year covered something like 100,000 acres, and included not less than 150,000 acres within its limits. It was estimated to be about 40 miles in length and from 3 to 10 miles in width. It is difficult to approximate the number of millions of pigeons that occupied that great nesting place.

* * * * *

It has been stated that the wild pigeon "went off like dynamite." Even the naturalists failed to secure sufficient specimens and notes, as no one had an idea that extinction was imminent. (Game Birds, Wild Fowl, and Shorebirds, Forbush, pp. 433, 446, 455.)

Shorebirds were found by the early settlers of this country in vast numbers on the coasts, the inland lakes, and even on the prairies, and while comparatively few now remain it was not until the early seventies that there was a marked lessening of their

numbers. Since then shorebirds have been so persecuted that vigorous measures must be taken, and immediately, to save them.

* * * * *

How they abounded formerly and how they were slaughtered by southern gunners is forcibly shown by the record of a single hunter in Louisiana, who, during the 20 years from 1867 to 1887, killed 69,087 birds—an average of 3,500 snipe a winter. In 1870 about 100 snipe were killed by this man for each day that he hunted. The maximum was reached in 1875, with 150 birds a day; this fell to 100 in 1880 and to 80 in 1887.

* * * * *

One of the most striking examples of the havoc wrought by man in the ranks of shorebirds is afforded by the Eskimo curlew. When Audubon visited the Labrador coast in 1833 he said of their numbers: "The accounts given of these birds border on the miraculous"; and later, when he saw them for himself, he reports that they "arrived in such dense flocks as to remind me of the passenger pigeons."

* * * * *

These enormous flocks now exist only in memory; scarcely a dozen individual birds have been seen in the last dozen years. (Wells W. Cooke, Yearbook of the Department of Agriculture for 1914, pp. 275, 279, 286, 287, 289.)

Many years ago the wood duck was the most abundant of all wild fowl in many well-wooded regions of the United States. Hundreds flocked along the wooded streams and about the woodland ponds. * * *

This species is the loveliest of all wild fowl. Even the Mandarin duck of China is not so strikingly beautiful.

* * * * *

Within my own recollection it bred commonly over a considerable part of Massachusetts, but at the beginning of this century the species was evidently in danger of extinction. (Forbush, Game Birds, Wild Fowl, and Shore-birds, pp. 106, 107.)

From the records that with great pains and labor were gathered by the State game commission, and which were furnished me for use here by President Frank M. Miller, we set forth this remarkable exhibit of old-fashioned abundance in game, A. D. 1909:

Official record of game killed in Louisiana during the season (12 months) of 1909–10.

Wild ducks, sea and river	3, 176, 000
Coots	280, 740
Geese and brant	202, 210
Snipe, sandpiper, and plover	606, 635
Quail (bobwhite)	1, 140, 750
Doves	310, 660
Wild turkeys	2, 219
Total number of game birds killed	5, 719, 214

* * * * *

Here is a case by way of illustration, copied very recently from the Atlanta Journal:

> EDITOR JOURNAL: I located a robin roost up the Trinity River, 6 miles from Dallas, and prevailed on six Dallas sportsmen to go with me on a torchlight bird hunt. This style of hunting was, of course, new to the Texans, but they finally consented to go, and I had the pleasure of showing them how it was done.

Equipped with torchlights and shotguns, we proceeded. After reaching the hunting grounds the sport began in reality, and continued for 2 hours and 10 minutes, with a total slaughter of 10,157 birds, an average of 1,451 birds killed by each man.

But the Texans give me credit for killing at least 2,000 of the entire number. I was called "the king of bird hunters" by the sportsmen of Dallas, Tex., and have been invited to command in chief the next party of hunters which go from Dallas to the Indian Territory in search of large game. F. L. Crow, Dallas, Tex., former Atlantan.

Dallas, Tex., papers and Oklahoma papers please copy.

As a further illustration of the spirit manifested in the South toward robins, I quote the following story from Dr. P. P. Claxton, of the University of Tennessee, as related in Audubon Educational Leaflet No. 46, by Mr. T. Gilbert Pearson:

* * * * *

A man would climb a cedar tree with a torch, while his companions with poles and clubs would disturb the sleeping birds on the adjacent trees. Blinded by the light, the suddenly awakened birds flew to the torchbearer; who, *as he seized each bird would quickly pull off its head*, and drop it into a sack suspended from his shoulders.

The capture of three or four hundred birds was an ordinary night's work. Men and boys would come in wagons from all the adjoining counties and camp near the roost for the purpose of killing robins. Many times 100 or more hunters with torches and clubs would be at work in a single night. For three years this tremendous slaughter continued in winter—and then the survivors deserted the roost.

* * * One small hamlet sent to market annually enough dead robins to return $500 *at 5 cents per dozen;* which means 120,000 birds!

* * * * *

There is time and space only in which to notice the most prominent of the doomed species, and perhaps discuss a few examples by way of illustration. Here is a—

PARTIAL LIST OF NORTH AMERICAN BIRDS THREATENED WITH EARLY EXTERMINATION.

Whooping crane.
Trumpeter swan.
American flamingo.
Roseate spoonbill.
Scarlet ibis.
Long-billed curlew.
Hudsonian godwit.
Upland plover.
Red-breasted sandpiper.
Golden plover.
Dowitcher.
Willet.
Pectoral sandpiper.
Black-capped petrel.
American egret.
Snowy egret.
Wood duck.
Band-tailed pigeon.
Heath hen.
Sage grouse.
Prairie sharp-tail.
Pinnated grouse.
White-tailed kite.

—(Our Vanishing Wild Life, Wm. T. Hornaday, pp. 5, 106, 107, 18.)

○

FILED
MAR 1
JAMES D.

Supreme Court of the United States

OCTOBER TERM, 1919.

No. 609.

THE STATE OF MISSOURI,

Appellant,

vs.

RAY V. HOLLAND, United States Game Warden.

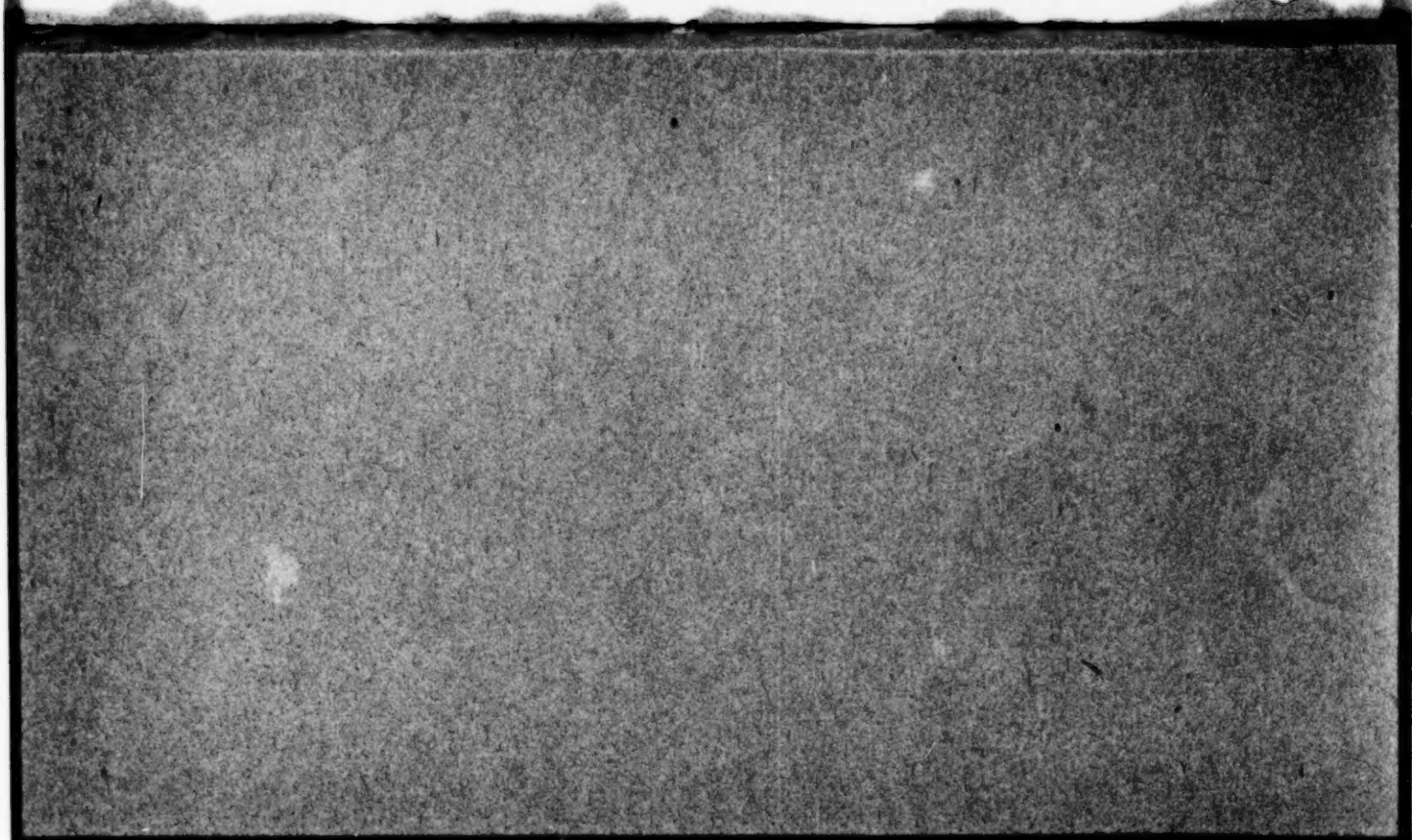
Appeal from the District Court of the United States for the Western District of Missouri.

BRIEF FOR ASSOCIATION FOR THE PROTECTION OF THE ADIRONDACKS, AMICUS CURIAE.

LOUIS MARSHALL,

of Counsel.

R. H. Thomas, Printer, 2054 Fulton Street, New York.



SUBJECT INDEX

	PAGES
Statement	1-5
Argument:	
Point I. Irrespective of whether migratory birds may be considered property belonging to the United States and regardless of the sanction of the treaty-making power, the Migratory Bird Treaty Act, as was its precursor the Act of March 4, 1913 (37 Stat. c. 145, p. 847) is valid as an enactment of "needful rules and regulations" respecting the national forests and other parts of the public domain, which constitute "property belonging to the United States," within the meaning of paragraph 2, section 3 of article IV of the Constitution	5-49
(1) The extent and area of the national forests and of other lands belonging to the United States	5-11
(2) The powers of Congress to legislate for and to regulate the public domain	11-28
(3) The necessity of bird life to the continuance of vegetable life	28-42

PAGE

(4) The fact that the States are trustees of animals *ferae naturae* within their boundaries, does not prevent the United States from preserving such animals for the purpose of protecting its property..... 42-49

Appendix A 51-61

Being a reprint of pages 227 to 233 of Dr. W. T. Hornaday's book, "Our Vanishing Wild Life." These pages relate exclusively to Shore Birds, including Snipe and Plover, referred to in the Amended Complaint in this action.

CASES AND AUTHORITIES CITED.

Decisions:

	PAGE
Camfield *v.* U. S. (167 U. S. 518).....15,	42, 47
Carey *v.* South Dakota (250 U. S. 118)...	49
Champion *v.* Ames (188 U. S. 363).....	22
Dakota Central Tel. Co. *v.* South Dakota (250 U. S. 163)	22
Downes *v.* Bidwell (182 U. S. 268).....	14
Dryfoos, Blum & Co. *v.* Edwards (decided Dec. 15, 1919)	22
Geer *v.* Connecticut (161 U. S. 519).....	42
Gibson *v.* Chouteau (13 Wall. 92).....	13
Golconda Cattle Co. *v.* U. S. (201 Fed. Rep. 285)	21
Hamilton *v.* Kentucky Dist. & W'h. Co. (decided Dec. 15, 1919)	22
Irvine *v.* Marshall (20 How. 558).....	12
Jacob Ruppert *v.* Caffey (decided Jan. 5, 1920)	22
Jourdan *v.* Barrett (4 How. 169)	12
Kansas *v.* Colorado (206 U. S. 46).....	48
Kennedy *v.* Becker (241 U. S. 562).....	43
Light *v.* U. S. (220 U. S. 523).....	19
Martin *v.* Hunter (1 Wheat. 363).....	43
Mormon Church *v.* U. S. (136 U. S. 1)...	14
McCray *v.* U. S. (195 U. S. 27).....	22
McCullough *v.* Maryland (4 Wheat. 316).	23
McKinley *v.* U. S. (249 U. S. 397).....	22

PAGE

Neagle, *In re* (135 U. S. 1).....21, 26, 44
Northern Pacific Ry. Co. *v.* North Dakota (250 U. S. 135)..... 22

Shannon *v.* U. S. (160 Fed. Rep. 870)... 21
Siebold, *Ex parte* (100 U. S. 371)..... 44
South Carolina *v.* U. S. (199 U. S. 437)..45, 46

Tennessee *v.* Davis (100 U. S. 263)..... 44

U. S. *v.* Doremus (249 U. S. 86)..... 22
U. S. *v.* Gratiot (14 Pet. 626)..... 11
U. S. *v.* Grimaud (220 U. S. 506)..... 19
U. S. *v.* Rio Grande Dam & Irrigation Co. (174 U. S. 690)..... 15
U. S. *v.* Staples (258 Fed. Rep. 479)..... 5
Utah P. & L. Co. *v.* U. S. (243 U. S. 389). 18

Van Brocklin *v.* Tennessee (117 U. S. 151) 14
Veazie Bank *v.* Fenno (8 Wall. 548)..... 22

Ward *v.* Race Horse (163 U. S. 504).... 42
Wilcox *v.* Jackson (13 Pet. 498)..... 13

Yarbrough, *Ex parte* (110 U. S. 651).... 47

TEXT WRITERS AND PUBLICATIONS.

American Forestry, July, 1915..... 33, 34
American Forestry, Vol. 21, pp. 681-691... 32
American Forestry, August, 1915..... 34, 35
American Forestry, October, 1916..... 8

"Bird Enemies of Forest Insects," McAtee 32
Buckland, James, "The Value of Birds to Man" 37

"Crawfish as Crop Destroyers," A. K. Fisher 38

PAGE

"Food Habits of the Mallard Ducks of the U. S." 37
Forbush, Edward H., "Useful Birds and Their Protection" 28

"Government Forest Work" 11

Hornaday, Dr. W. T., "Our Vanishing Wild Life" 35, 51-61
"Hornaday's Wild Life Conservation"... 32

Minnesota Fish & Game Commrs. Biennial Report 38
McAtee, Prof. W. L., "Our Vanishing Shorebirds" 51
McAtee, Prof. W. L., "Bird Enemies of Forest Insects" 32

"New York World" Almanac, 1916..... 6, 8

"Our Vanishing Shorebirds," McAtee.... 49
"Our Vanishing Wild Life," Hornaday.35, 51-61

Roberts, Dr. Thomas S. 38

Smithsonian Report for 1913..... 37
Statistical Abstract of the U. S. for 1915... 5

"The Value of Birds to Man," Buckland.. 37

U. S. Dept. Agriculture, Bulletin No. 720.. 37
U. S. Dept. Agriculture, Year Book 1911.. 38
"Useful Birds and Their Protection," Forbush 28

Willoughby, Constitution Law, U. S., Vol. 1, §33 23

STATUTES AND TREATIES.

Constitution:	PAGE
Article I, par. 18, §8	22
Article IV, par. 2, §3	2
Article VI	43
Convention Between United States and Great Britain and Ireland, Aug. 16, 1916.	1, 2, 3
Migratory Bird Treaty Act (40 St. L., c. 21, §1)	1, 2, 3
Proclamation of the President, July 21, 1918	3
Revised Statutes, §5388	18
18 Statutes at Large, 481	18
23 Statutes at Large, 321	15
25 Statutes at Large, 594	18
26 Statutes at Large 285, 1047 (1889-1891)	41
27 Statutes at Large, 737 (1891-1893)	41
28 Statutes at Large, 267, 730 (1893-1895)	41
29 Statutes at Large, 102 (1895-1897)	41
30 Statutes at Large, 35	18
30 Statutes at Large, 4, 333, 951 (1897-1899)	41
31 Statutes at Large, 170	18
31 Statutes at Large, 495, 932 (1899-1901)	41
32 Statutes at Large, 298, 1160 (1901-1903)	41
33 Statutes at Large, Part 1, 289, 290, 876 (1903-1905)	41
34 Statutes at Large, Part 1, 688, 1273, 1274 (1905-1907)	41
35 Statutes at Large, Part 1, 262, 1050 (1907-1908)	41
36 Statutes at Large, Part 1, 2nd Session, 433	41

PAGE

36 Statutes at Large, Part 1, 3rd Session, 1256, 1257 41
37 Statutes at Large, Part 1, 2nd Session, 291 41
38 Statutes at Large, 3rd Session, 845 846 41
Sixty-third Congress, 2nd Session, Part 1, 433 40
Sixty-third Congress, 3rd Session, Part 1, 1103, 1104 41
Sixty-fourth Congress, 1st Session, Part 1, 465, 466 41
Sixty-fourth Congress, 2nd Session, Part 1, 1153, 1154 41
Sixty-fifth Congress, 2nd Session, Part 1, 993, 994 41

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1919.

THE STATE OF MISSOURI,
Appellant,

against

RAY P. HOLLAND, United States Game Warden.

No. 609.

Brief for the Association for the Protection of the Adirondacks, Amicus Curiae.

The interest of the intervenor in the preservation of the forest and other lands of the United States, and incidentally in the protection of birds, has induced it to submit the following considerations in support of the contention that the "Migratory Bird Treaty Act" is a constitutional exercise of congressional power.

In view of the exhaustive arguments that will doubtless be submitted in support of the proposition that this legislation finds support in the treaty-making power exercised by the adoption of the convention between the United States and the United Kingdom of Great Britain and Ireland for the protection of migratory birds in the

United States and Canada, concluded and signed on August 16, 1916, it will not be advisable to consider that phase of the subject in this brief. It is our sole purpose to show that, independently of the treaty-making power, the legislation, whose constitutionality is challenged in this action, is supported by the express terms of paragraph 2 of Section 3 of Article IV of the Constitution, which read:

"The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."

The purpose of this legislation as well as the object of the Treaty is declared in the following recitals with which the Treaty begins:

"Whereas, Many species of birds in the course of their annual migrations traverse certain parts of the United States and the Dominion of Canada; and

Whereas, Many of these species are of great value as a source of food or *in destroying insects which are injurious to forests and forage plants on the public domain, as well as to agricultural crops,* in both the United States and Canada, but are nevertheless in danger of extermination through lack of adequate protection during the nesting season or while on their way to and from their breeding ground."

Article I of the Treaty declares that the migratory birds included in the terms of the convention are those which it proceeds to enumerate. Articles II, III and IV refer to the establishment of closed seasons during which no hunting of these birds shall be carried on. Article V prohibits the taking of the nests or eggs of such birds. Article VI relates to the regulation of the ship-

ping and export of such birds and their eggs; Article VII to the granting of permits to kill any of the birds enumerated which under extraordinary conditions may become seriously injurious to the agricultural or other interests in any particular community. By Article VIII it is agreed by the High Contracting Powers to take or propose to their respective appropriate law-making bodies the necessary measures for insuring the execution of the convention.

The Act of July 3, 1918 (*40 St. L., ch. 121, §1*), known by the short title of the "Migratory Bird Treaty Act," as the title indicates, was enacted "to give effect to the convention between the United States and Great Britain for the protection of migratory birds, concluded at Washington August 16, 1916, and for other purposes."

By Proclamation of the President, dated July 21, 1918, regulations formulated by the Secretary of Agriculture were published in accordance with and to give effect to the provisions of Section 3 of the Act.

The State of Missouri brings this action in its sovereign capacity and as the representative of all of the people of the State, alleging that "it holds the title to and has the absolute right and power to control and regulate the taking, killing and use *of wild game* found within its borders for the benefit of all the people of the State, to whom in their united and sovereign capacity the same belongs; that *among the said wild game* within the borders of the complainant are anatidæ or waterfowls, including numbers of wild geese, brant, ducks, snipe, plover, *etc.*" It may be said, parenthetically, that snipe and plover are not anatidæ or waterfowl, but limicolæ or shorebirds. It is further alleged that under the laws of Missouri "the taking, killing and using of the afore-

said waterfowls is permitted and is lawful between the 15th day of September of each year and the 30th day of April of the following year"; that the complainant during the year 1918 "collected for the issuance of licenses for hunting wild game in the State" approximately $75,000, and that a like amount or more will be collected in future years, "but that the acts of the defendant of which complaint is made if continued will so deter citizens of the State from exercising the right to take *wild game* under the licenses therefor issued under the laws of the State that the payment of license fees will be greatly diminished"; that the defendant, acting under the Migratory Bird Treaty Act and the regulations and orders of the Secretary of Agriculture of the United States, has attempted to regulate and control the taking, killing and use of *wild game* in the State of Missouri and other States of the United States, and to prohibit the taking, killing or using of waterfowls in that State during the months of February, March and April of any year, and his acts in the premises are charged to constitute an invasion of the sovereign right and power of the complainant to control and regulate the taking, killing and use of *wild game* within its borders, and a usurpation of the sovereign right and power reserved to the State under Article X of the Amendments to the Constitution of the United States. It is alleged that the Act of Congress and the regulations and orders of the Secretary of Agriculture are an attempt to control the taking, killing and using of *wild game animals* in the State of Missouri, and especially the waterfowl mentioned, in direct violation of Article X of the Amendments to the Constitution of the United States, and are unconstitutional, illegal and void.

The demurrer interposed on behalf of the defendant, which was sustained in the District Court, presents the issue of law as to the constitutionality of this legislation which is now to be determined.

The opinion of the District Court is reported under the title, *United States vs. Staples, 258 Fed. Rep. 479.*

POINTS

I.

Irrespective of whether migatory birds may be considered property belonging to the United States and regardless of the sanction of the treaty-making power, the Migratory Bird Treaty Act, as was its precursor the Act of March 4, 1913 (37 Stat. c. 145 p. 847) is valid as an enactment of "needful rules and regulations" respecting the national forests and other parts of the public domain, which constitute "property belonging to the United States," within the meaning of paragraph 2, section 3 of article IV of the Constitution.

(1) *The extent and area of the national forests and of other lands belonging to the United States.*

(a) The forest domain of the United States is in itself an empire. Excluding from consideration the land areas unappropriated and unreserved, which on June 30, 1915, as shown by the Statistical Abstract of the United States for 1915, Thirty-eighth Number, issued by the Department of Commerce, aggregated 279,544,494 acres, over and beyond the 378,165,760 acres of unappropri-

ated land in Alaska, the area of forest lands reserved for national forests, as of June 30, 1915, as shown by the report just referred to, amounted to 162,773,280 acres. In addition to these forest lands thus reserved and which are divided into 162 national forests, located in twenty States and in Alaska and Porto Rico, the United States Government is now acquiring new national forests in the White Mountains and in the Lower Appalachian Range, including territory in seven additional States, which will involve the purchase and acquisition of 6,966,304 additional acres of forest lands reserved by the United States, making an aggregate of upwards of 169,639,106 acres. Reduced to square miles, the total of the reserved national forests constitute 265,061 square miles. When compared with the area of most of the leading countries of the world, as shown on pages 450 and 451 of the New York World Almanac for 1916, the magnitude of these forest reserves will be better appreciated. Sweden and Norway combined have 296,905 square miles; Central America, Panama, Cuba and Hayti, 260,813; the Austro-Hungarian Empire had 260,034; the German Empire, 208,780; France, 207,054; Bulgaria, Serbia, Roumania, Greece, Albania, Montenegro and European Turkey combined had 205,172; Great Britain and Ireland, 121,331; Spain has 190,050; Italy, 110,623, and Belgium, The Netherlands, Denmark and Switzerland, combined, have 55,383.

Our national forest reserves, therefore, are greater in extent than the total territory of any one of these groups, except Sweden and Norway, whose excess of area is approximately 32,000 square miles only.

The location and acreage of the forest lands, exclusive of those recently acquired and in process of being acquired under the Weeks law, is shown by States as follows:

Area of the National Forests on June 30, 1915, by States.

State.	*Net Area, Acres.*
Arizona	12,288,125
Arkansas	1,169,379
California	19,866,203
Colorado	13,107,681
Florida	299,166
Idaho	17,868,826
Kansas	139,049
Michigan	83,157
Minnesota	987,377
Montana	16,104,734
Nebraska	198,056
Nevada	5,287,710
New Mexico	8,469,511
North Dakota	6,414
Oklahoma	61,480
Oregon	13,259,992
So. Dakota	1,129,208
Utah	7,449,160
Washington	9,953,166
Wyoming	8,385,288
Alaska	26,626,623
Porto Rico	32,975
Grand Total	162,773,280

(162 National Forests.)

(b) The United States also owns additional vast areas of lands on which there is but little forest growth, but which are valuable because of the grass and forage plants upon them that are valuable for grazing purposes.

The proportion of Government owned lands in a number of the Western States, and the percent-

age of the area of those States reserved for national forests, is as shown by the following table (*American Forestry*, October, 1916, p. 619):

	Total per cent. owned by the United States.	National Forests.
Arizona	70.2	17.2
California	44.1	20.4
Colorado	49.6	20.2
Idaho	65.5	33.2
Montana	43.4	17.4
Nevada	89.8	7.5
New Mexico	49.8	11.0
Oregon	49.3	21.6
Utah	78.9	14.2
Washington	30.8	23.0
Wyoming	68.2	13.5

In the New York World Almanac for 1916, at pages 143-147, appears an article entitled "Forests and Forestry," which contains the substance of the official report for the year ending June 30, 1915, in which a number of important facts bearing on the subject are collated. Among other things it is shown that, during the fiscal year 1915, 689,013,000 board feet of timber were cut from the national forests; that the value of the public property administered by the forest service is estimated at over $2,000,000,000; that the normal gross cost of administration and protection of the national forests is approximately $4,750,000; that under the Weeks law an appropriation was made for the acquisition of additional forest lands on the water-sheds of navigable streams of $2,000,000 per year for five and one-half years, beginning the last half of the fiscal year 1911, and that the agricultural appropriation bill for the fiscal year 1913

made the appropriation for 1912, and for subsequent years, available until expended.

FOREST LANDS ACQUIRED UNDER THE WEEKS LAW:

Areas, June 30, 1915.

(Source: Reports of the Forest Service, Department of Agriculture.)

State and Area.	Acquired.	Additional approved for purchase.	Total.
Georgia	35,174.59	59,560.30	94,734.89
New Hampshire	106,012.67	160,258.90	266,271.57
North Carolina	69,507.98	185,595.15	255,103.13
South Carolina	.....	17,816.62	17,816.62
Tennessee	72,930.88	190,916.80	263,847.68
Virginia	46,409.44	237,425.41	283,834.85
West Virginia	18,240.10	85,264.55	103,504.65
Grand Total	348,275.66	936,837.93	1,285,113.59

(c) In addition to the lands now devoted to forests which belong to the United States, many millions of acres which are not specially adapted for agriculture, are available for afforestation and reforestation; and it is not to be forgotten that 279,544,494 acres of unappropriated and unreserved lands, exclusive of those in Alaska, some of which are surveyed and others still remain unsurveyed, not only are now valuable because of the growth thereon of grass and of forage plants, but are destined to be devoted to agriculture, to the planting of orchards and gardens, and other similar uses. Reduced to square miles, this part of the public domain amounts to 436,787 square miles, and is distributed among the various States as shown by the subjoined table:

LAND AREAS UNAPPROPRIATED AND UNRESERVED:

By States, Year Ending June 30, 1915.

	1915		
	Surveyed Acres	Unsurveyed Acres	Total Acres
Alabama	47,940	.....	47,940
Arizona	10,686,788	26,123,539	36,810,327
Arkansas	258,115	20,040	278,155
California	16,244,018	4,391,905	20,635,923
Colorado	15,328,580	1,907,534	17,236,114
Florida	136,793	131,691	268,484
Idaho	8,490,825	7,721,448	16,212,273
Kansas	75,214	.....	75,214
Louisiana	62,619	38,397	101,016
Michigan	76,030	.....	76,030
Minnesota	943,831	.....	943,831
Mississippi	36,882	.....	36,882
Missouri	923	.....	923
Montana	10,804,819	8,260,302	19,065,121
Nebraska	179,961	12,397	192,358
Nevada	29,834,403	25,583,343	55,417,746
New Mexico	19,483,811	8,304,546	27,788,357
North Dakota	493,667	.....	493,667
Oklahoma	42,177	.....	42,177
Oregon	13,604,733	1,837,445	15,442,178
South Dakota	2,880,828	53,781	2,934,609
Utah	13,545,395	19,818,442	33,363,837
Washington	932,837	211,768	1,144,605
Wisconsin	6,758	.....	6,758
Wyoming	28,789,965	2,140,004	30,929,969
Total	172,987,912	106,556,582	279,544,494

The unappropriated lands in Alaska are not included here. The total area of Alaska is 378,165,760 acres, of which about 20,898,000 acres are reserved. Approximately 300,000 acres have been surveyed under the rectangular system within the past five years.

As already stated, large portions of these lands are arable and are adapted for agriculture and for the planting of orchards and gardens. Even in their uncultivated state they are covered with grass and forage plants, and flocks of sheep and herds of cattle are grazed and fattened upon them.

Their present value is enormous, while their potential value is well nigh incalculable. The Government is in receipt of a large income from grazing fees. It employs a large force of men in its Forest Service and in the protection of its vast landed interests. In the Forest Service alone it employed on July 1, 1915, 3,875 men as supervisors, rangers, guards, and in other similar service. At the same time, as is shown by a pamphlet entitled "Government Forest Work," the pasture land contained in the forest reserves was used "by some 7,280,000 sheep and goats and 1,725,000 cattle and horses every year, in addition to their natural increase."

(2) *The powers of Congress to legislate for and to regulate the public domain.*

Whatever difference of opinion may have existed with respect to the extent of the power conferred on Congress by so much of Section 3 of Article IV of the Constitution, empowering it to make needful rules and regulations respecting the territory belonging to the United States, there has been no conflict as to the significance of so much of that section as relates to the making of rules and regulations respecting the property belonging to the United States, or its "territory," regarding that word as signifying landed ownership.

In *United States* v. *Gratiot, 14 Pet. 626,* Mr. Justice Thompson, after quoting the terms of the constitutional provision, said:

"The term 'territory,' as here used, is merely descriptive of one kind of property; and is equivalent to the word lands. And Congress has the same power over it as over any other property belong-

ing to the United States; and this power is vested in Congress without limitation; and has been considered the foundation upon which the territorial governments rest."

In *Jourdan* v. *Barrett, 4 How. 169, 185,* Mr. Justice Catron, after quoting the language of the Constitution, added:

"For the disposal of the public lands, therefore, in the new States, where such lands lie, Congress may provide by law; and having the constitutional power to pass the law, it is supreme; *so Congress may prohibit and punish trespassers on the public lands.* Having the power of disposal and of protection, Congress alone can deal with the title, and no State law, whether of limitations or otherwise, can defeat such title."

In *Irvine* v. *Marshall, 20 How. 558,* Mr. Justice Daniel said:

"It cannot be denied that all the lands in the Territories, not appropriated by competent authority before they were acquired, are in the first instance the exclusive property of the United States, to be disposed of to such persons, at such times, and in such modes, and by such titles, as the Government may deem most advantageous to the public fisc, or in other respects most politic."

At page 566 he said:

"With respect to the power of the Federal Government to assert, through the instrumentality of its appropriate organs, the administration of its constitutional rights and duties, and with regard to such an assertion as exemplified in the management and disposition of the public lands, and the titles thereto, the interpretation of this court has been settled too conclusively to admit of controversy."

The decision in *Wilcox* v. *Jackson, 13 Pet. 498,* is then cited, and the following quotation is made from the opinion in that case:

"But the property in question was a part of the public domain of the United States. Congress is invested by the Constitution with the power of disposing of and making needful rules and regulations respecting it. Congress has declared, as we have said, by its legislation, that in such a case as this, a patent is necessary to complete the title. But in this case no patent has issued; and therefore, by the laws of the United States, the legal title has not passed, but remains in the United States. Now, if it were competent for a State legislature to say, that notwithstanding this, the title shall be deemed to have passed, the effect would be, not that Congress had the power of disposing of the public lands, and prescribing the rules and regulations concerning that disposition, but that Illinois possessed it. That would be to make the laws of Illinois paramount to those of Congress in relation to a subject confided by the Constitution to Congress only; and the practical result in this very case would be, by force of State legislation, to take from the United States their own lands, against their own will and against their own laws."

In *Gibson* v. *Chouteau, 13 Wall. 92, 99,* Mr. Justice Field said:

"With respect to the public domain, the Constitution vests in Congress the power of disposition and of making all needful rules and regulations. That power is subject to no limitations. Congress has the absolute right to prescribe the times, the conditions, and the mode of transferring this property, or any part of it, and to designate the persons to whom the transfer shall be made. No state legislation can interfere with this right or embarrass its exercise; and to prevent the possibility of any attempted interference with it, a provision has been usually inserted in the

compacts by which new States have been admitted into the Union, that such interference with the primary disposal of the soil of the United States shall never be made."

In *Van Brocklin* v. *State of Tennessee, 117 U. S. 151, 168,*

"But public and unoccupied lands, to which the United States have acquired title, either by deeds of cession from other States, or by treaty with a foreign country, Congress, under the power conferred upon it by the Constitution, 'to dispose of and make all needful rules and regulations respecting the territory or other property of the United States,' has the exclusive right to control and dispose of, as it has with regard to other property of the United States; and no State can interfere with this right, or embarrass its exercise."

In *Mormon Church* v. *United States, 136 U. S. 1, 42,* Mr. Justice Bradley used the following language, which was cited with approval by Mr. Justice Brown in *Downes* v. *Bidwell, 182 U. S. 268*:

"The power to make acquisitions of territory by conquest, by treaty and by cession is an incident of national sovereignty. The territory of Louisiana, when acquired from France, and the territories west of the Rocky Mountains, when acquired from Mexico, became the absolute property and domain of the United States, subject to such conditions as the government, in its diplomatic negotiations, had seen fit to accept relating to the rights of the people then inhabiting those territories. Having rightfully acquired said territories, the United States government was the only one which could impose laws upon them, and its sovereignty over them was complete. No State of the Union had any such right of sovereignty over them; no other country or government had any such right."

In *United States* v. *Rio Grande Dam & Irrigation Co., 174 U. S. 690, 703,* Mr. Justice Brewer said:

"Although this power of changing the common law rule as to streams within its dominion undoubtedly belongs to each State, yet two limitations must be recognized: First, that in the absence of specific authority from Congress a State cannot by its legislation destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its water; so far at least as may be necessary for the beneficial uses of the government property. Second, that it is limited by the superior power of the General Government to secure the uninterrupted navigability of all navigable streams within the limits of the United States. * * * It is true there have been frequent decisions recognizing the power of the State, in the absence of congressional legislation, to assume control of even navigable waters within its limits to the extent of creating dams, booms, bridges and other matters which operate as obstructions to navigability. The power of the State to thus legislate for the interests of its own citizens in conceded, and until in some way Congress asserts its superior power, and the necessity of preserving the general interests of the people of all the States, it is assumed that State action, although involving temporarily an obstruction to the free navigability of a stream, is not subject to challenge."

In *Camfield* v. *United States, 167 U. S. 518,* the constitutionality of the act of February 25, 1885, Chapter 149, (23 Statutes 321,) was sustained. That act declared unlawful all enclosures of any public lands in any State or Territory of the United States which included in the enclosure land to which the person making it had no claim or color or title. Section 2 made it the duty of the District Attorney of the United States for the

proper district, to institute a civil suit in the name of the United States to restrain violations of the statute. Section 4 made a violation of the act a misdemeanor. Camfield constructed an enclosure *upon his own land* in such a manner as to interfere with access to the public lands, although he did not in fact trespass on the Government property. His act was nevertheless declared unlawful, and the validity of the enactment was sustained in an opinion by Mr. Justice Brown, from which because of its applicability to the present case, we make the following extended excerpt:

"While the lands in question are all within the State of Colorado, the Government has, with respect to its own lands, the rights of an ordinary proprietor, to maintain its possession and to prosecute trespassers. It may deal with such lands precisely as a private individual may deal with his farming property. It may sell or withhold them from sale. It may grant them in aid of railways or other public enterprises. It may open them to preëmption or homestead settlement; but it would be recreant to its duties as trustee for the people of the United States to permit any individual or private corporation to monopolize them for private gain, and thereby drive intending settlers from the market. It needs no argument to show that the building of fences upon public lands with intent to enclose them for private use would be a mere trespass, and that such fences might be abated by the officers of the Government or by the ordinary processes of courts of justice. To this extent no legislation was necessary to vindicate the rights of the Government as a landed proprietor.

"But the evil of permitting persons, who owned or controlled the alternate sections, to enclose the entire tract, and thus to exclude or frighten off intending settlers, finally became so great that Congress passed the act of February 25, 1885, forbidding all enclosures of public lands, and authorizing the abatement of the fences. If the act be

construed as applying only to fences actually erected upon public lands, it was manifestly unnecessary, since the Government as an ordinary proprietor would have the right to prosecute for such a trespass. It is only by treating it as prohibiting all 'enclosures' of public lands, by whatever means, that the act becomes of any avail. The device to which defendants resorted was certainly an ingenious one, but it is too clearly an evasion to permit our regard for the private rights of defendants as landed proprietors to stand in the way of an enforcement of the statute. So far as the fences were erected near the outside line of the odd-numbered sections, there can be no objection to them; but so far as they were erected immediately outside the even-numbered sections, they are manifestly intended to enclose the Government's lands, though, in fact, erected a few inches inside the defendants' line. Considering the obvious purposes of this structure, and the necessities of preventing the enclosure of public lands, we think the fence is clearly a nuisance, and that it is within the constitutional power of Congress to order its abatement, notwithstanding such action may involve an entry upon the lands of a private individual. The General Government doubtless has a power over its own property analogous to the police power of the several States, and the extent to which it may go in the exercise of such power is measured by the exigencies of the particular case. If it be found to be necessary for the protection of the public, or of intending settlers, to forbid all enclosures of public lands, the Government may do so, though the alternate sections of private lands are thereby rendered less available for pasturage. The inconvenience, or even damage, to the individual proprietor does not authorize an act which is in its nature a purpresture of Government lands. While we do not undertake to say that Congress has the unlimited power to legislate against nuisances within a State, which it would have within a Territory, we do not think the admission of a Territory as a State deprives it of the power of legislating for the protection of the public lands, though it may thereby involve

the exercise of what is ordinarily known as the police power, so long as such power is directed solely to its own protection. A different rule would place the public domain of the United States completely at the mercy of State legislation."

In *Utah Power and Light Co.* v. *United States, 243 U. S. 389, 404,* Mr. Justice Van Devanter said:

"And so we are of the opinion that the inclusion within a State of lands of the United States does not take from Congress the power to control their occupancy and use, to protect them from trespass and injury and to prescribe the conditions upon which others may obtain rights in them, even though this may involve the exercise in some measure of what commonly is known as the police power."

The concluding sentence of the quotation, from the opinion in *Camfield* v. *United States* (*supra*), is referred to in support of this proposition.

Under the constitutional provision now under consideration, Congress has passed various enactments relating to the protection of Government forest lands. Thus, by Section 5388 of the United States Revised Statutes, depredations on public timber lands are punishable. By the act of February 24, 1897, 25 Statutes, 594, amended by the act of May 5, 1900, 31 Statutes, 170, provisions are made for the prevention of forest fires, and punishment for a violation of the terms of the statute is prescribed. By the act of March 3, 1875, Chapter 151, 18 Statutes, 481, injury to trees, fences and walls on lands of the United States, and driving cattle into public parks, are made crimes. By 30 Statutes, 35, provision is made for the protection of the forest reservation against fire and for punishing violations of the act.

The act of June 4, 1897, Chapter 2 (30 Statutes, 35), which related to the protection of the forest

reserves, provides that the Secretary of Agriculture might "make such rules and regulations as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction; and any violation of the provisions of this act or of such rules and regulations shall be punished as is provided in Section 5388, Chapter 3, page 1044, of the Revised Statutes as amended."

Such regulations having been made and violated, it was decided in *United States* v. *Grimaud, 220 U. S. 506,* that this legislation, even though it involved the making of regulations by the Secretary of Agriculture, punishable as a crime did not violate the organic law. Mr. Justice Lamar said:

"To pasture sheep and cattle on the reservation, at will and without restraint, might interfere seriously with the accomplishment of the purposes for which they were established. * * * In the nature of things it was impracticable for Congress to provide general regulations for these varying and various details of management. Each reservation had its peculiar and special features; and in authorizing the Secretary of Agriculture to meet these local conditions Congress was merely conferring administrative functions upon an agent, and not delegating to him legislative power. * * * The subjects as to which the Secretary can regulate are defined. The lands are set apart as a forest reserve. He is required to make provision to protect them from depredations and from harmful uses. He is authorized 'to regulate the occupancy and use and to preserve the forests from destruction.' A violation of reasonable rules regulating the use and occupancy of the property is made a crime, not by the Secretary, but by Congress. The statute not the Secretary, fixes the penalty."

In *Light* v. *United States, 220 U. S. 523,* Light was enjoined from pasturing his cattle on the

Holy Cross Forest Reserve, because he had refused to comply with the regulations adopted by the Secretary of Agriculture under the act just considered. The bill alleged that, with the expectation and intention that his cattle would do so, he had turned them out at a time and place which made it certain that they would leave the open public lands and go at once to the reserve where there was good water and fine pasturage. When notified to remove the cattle he declined to do so. He justified this position on the ground that the statutes of Colorado, where the reserve was located, provided that a land owner could not recover damages for trespass by animals unless the property was enclosed with a fence of designated size and material. He therefore claimed that unless the Government put a fence around the reserve, it had no remedy, and that he could not be required to prevent his cattle from straying upon the reserve from the open public land on which he had a right to turn them loose. It was argued on his behalf, among other things, that if the Federal Government had jurisdiction over these reservations to the extent necessary to support the decree, the State of Colorado would be deprived of its police power over a large portion of its territory, that fences and the trespasses of live stock is a proper subject of legislation under the police power of the State, and that the authority of Congress to protect public lands was so limited as not to deprive a State of an attribute of sovereignty.

Mr. Justice Lamar, however, met these contentions by saying (pp. 535, 536):

"It is contended, however, that Congress cannot constitutionally withdraw large bodies of land from settlement without the consent of the State where it is located; and it is then argued that the act of 1891 providing for the establishment of reservations was void, so that what is nominally a re-

serve is, in law, to be treated as open and unenclosed land, as to which there still exists the implied license that it may be used for grazing purposes. But the Nation is an owner, and has made Congress the principal agent to dispose of its property.' * * * 'Congress is the body to which is given the power to determine the conditions upon which the public lands shall be disposed of.' *Butte City Water Co.* v. *Baker, 196 U. S. 126.* 'The Government has with respect to its own land the rights of an ordinary proprietor to maintain its possession and prosecute trespassers. It may deal with such lands precisely as an ordinary individual may deal with his farming property. It may sell or withold them from sale.' *Camfield* v. *United States, 167 U. S. 524.* And if it may withhold from sale and settlement it may also as an owner object to its property being used for grazing purposes, for 'the Government is charged with the duty and clothed with the power to protect the public domain from trespass and unlawful appropriation.' *United States* v. *Beebee, 127 U. S. 342.* * * * It is true that the 'United States do not and cannot hold property as a monarch may for private or personal purposes.' *Van Brocklin v. Tennessee, 117 U. S. 158.* But that does not lead to the conclusion that it is without the rights incident to ownership, for the Constitution declares, § 3, Art. IV, that 'Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or the property belonging to the United States.' 'The full scope of this paragraph has never been definitely settled. Primarily, at least, it is a grant of power to the United States of control over its property.' *Kansas* v. *Colorado, 206 U. S. 89.*"

See also

In re Neagle, 135 U. S. 1, 65, 66, and quotation from opinion of Mr. Justice Miller, pp. 26, 27 (infra).

Shannon v. *United States, 160 Fed. Rep. 870.*

Golconda Cattle Co. v. *United States, 201 Fed. Rep. 285-291.*

If the power exerted by Congress, when it enacted the statute now under consideration, bears resemblance to the police power, the constitutional jurisdiction of Congress cannot be curtailed by that fact, so long as the rules and regulations prescribed by it have relation to the protection of the property of the United States and are needful therefor. Indeed the language of this particular constitutional grant is exceptional because it necessarily involves the power to regulate and to protect the public domain in a manner akin to the exercise of the police power. Here the latter was certainly more directly conferred than it was in the following instances where it was indirectly and incidentally employed, as *e. g.*, in connection with the taxing power, the war power and under the commerce clause.

McCray v. *United States, 195 U. S. 27.*
Veazie Bank v. *Fenno, 8 Wall. 548.*
United States v. *Doremus, 249 U. S. 86.*
Champion v. *Ames, 188 U. S. 363.*
McKinley v. *United States, 249 U. S. 397.*
Northern Pacific Ry. Co. v. *North Dakota, 250 U. S. 135.*
Dakota Central Telephone Co. v. *South Dakota, 250 U. S. 163.*
Hamilton v. *Kentucky Distilleries and Warehouse Co.* and *Dryfoos, Blum & Co.* v. *Edwards,* decided December 15, 1919.
Jacob Ruppert, a corporation, v. *Caffey, decided January 5, 1920.*

In this connection it is useful also to consider the language of paragraph 18, Section 8, Article I, of the Constitution, which reads:

"The Congress shall have power:

* * * * *

18. To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof."

Referring to this provision the author says in *1 Willoughby Constitutional Law of the United States, §33*:

"In pursuance of the foregoing principle the Supreme Court of the United States has, from the very beginning, declared that the powers thus impliedly granted to the General Government as necessary and proper for the exercise of the powers expressly given, are to be liberally construed. The words 'necessary and proper' it was early held, were not to be interpreted as endowing the General Government simply with those powers indispensably necessary for the exercise of its express powers, but as equipping it with any and every authority the exercise of which may in any way assist the Federal Government in effecting any of the purposes the attainment of which is within its constitutional sphere." (Citing *United States* v. *Fisher, 2 Cranch 358.*)

In *McCullough* v. *Maryland, 4 Wheat. 316*, dealing with this subject Chief Justice Marshall said:

"The government which has a right to do an act, and has imposed upon it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means."

To the argument that a selected means must be an indispensable as well as a proper one, he replied:

"Is it true that this is the sense in which the word 'necessary' is always used? Does it always import an absolute physical necessity, so strong

that one thing to which another may be deemed necessary, cannot exist without that other? We think it does not."

It is thus clear that Congress possesses plenary power to legislate for the protection of the public domain, including its forest and other lands, to the extent of the exigencies of the situation, and in a manner analogous to that which in the case of the several States involves the exercise of the police power. Even though these lands are located within State boundaries, this power includes the right of Congress to legislate against trespassers, to make laws for the prevention of destruction by fire, whether wilfully or negligently caused, for the inhibition of interference with access to the public lands and for prohibiting or preventing depredations upon or injury to trees and other vegetation growing upon them by the grazing of sheep and cattle, or otherwise.

The remedies provided by Congress in the exercise of this power have been both civil and criminal, legal and equitable. They have related not only to the punishment of acts declared unlawful, when committed, but also to the prevention of acts or the creation of conditions which might result in harm and injury. These powers of legislation necessarily must be co-extensive with the necessities warranting their exercise. Broadly speaking, it is the regulation of the property belonging to the United States. That involves the right of protection and control. Consequently it includes the power to prohibit any act which would neutralize any existing agency, whether natural or artificial, whether human or animal, calculated to protect the public domain. Thus any interference with or destruction of fences or barriers erected for the purpose of keeping out trespassers, the assault of an officer or warden designated by the Government of

the United States to exercise supervision over its public lands, the killing of a watch-dog placed upon the public domain for the purpose of keeping away trespassers, would all be acts injurious to property belonging to the United States, and, therefore, within the legislative and regulatory power of Congress respecting such property. In like manner the Government might prohibit by legislation the maintenance in proximity to its forests, on private lands, of a smelter or manufactory which discharges poisonous fumes deleterious to vegetation (*State of Georgia* v. *Tennessee Copper Co., 206 U. S. 230*), and it would be equally within its power to make punishable the introduction, whether wilful or otherwise, into its forests of noxious insects destructive of vegetation, such as the brown-tail moth, whose introduction into Massachusetts some years ago wrought havoc among its shade trees and forests.

For the like reason, if, as is the fact, both prairie and forest lands, are infested by hostile insects, which, if not held in check by their natural enemies, the birds, would result in the inevitable destruction of their vegetation, then it would necessarily follow that the power of Congress to make all needful rules and regulations respecting property belonging to the United States, includes the power to prohibit or regulate the killing of these natural guardians of the prairie and the forest, of this police agency supplied by the Creator for the preservation of vegetable life on the property belonging to the United States. In other words, if it is within the purview of the power of Congress to protect the forests against the axe and the fire of the trespasser, to preserve them from the injury that may be done by sheep and cattle, to punish any interference with the fences and enclosures with which the Government may surround its property, and to

make punishable any hindrance placed in the way of the protective agencies provided by the Government, then it is not conceivable that Congress is powerless to prevent the destruction of the only agency which can adequately cope with the hordes of insects that infest both field and forest which, unchecked, would accomplish their irretrievable ruin.

For the sake of illustration let us suppose that the Government in order to deal with this peril had imported from other lands insectivorous wild birds and had set them free to accomplish this object. Who would question the power of Congress to protect this protective agency, just as it might legislate for the protection of the Government officials charged with the duty of guarding the national domain? Is that power lessened or does it become non-existent, because the birds whose function it is to prevent insect depredations, visit the public domain in obedience to their natural instincts?

The principle underlying the decision *In re Neagle, 135 U S. 1,* is an answer to this inquiry. There, in the absence of an express statute, it was held to be within the power imposed upon the President by the Constitution to see that the laws be faithfully executed, to appoint officers to attend a judge in the exercise of his duties and to protect him against assaults or other injury.

In the course of the opinion rendered by Mr. Justice Miller, he practically anticipated the very point now before the Court, when he said (*pp. 65, 66*):

"The United States is the owner of millions of acres of valuable public land, and has been the owner of much more which it has sold. Some of these lands owe a large part of their value to the forests which grow upon them. These forests are

liable to depredations by people living in the neighborhood, known as timber thieves, who make a living by cutting and selling such timber, and who are trespassers. But until quite recently, even if there be one now, there was no statute authorizing any preventive measures for the protection of this valuable public property. Has the President no authority to place guards upon the public territory to protect its timber? No authority to seize the timber when cut and found upon the ground? Has he no power to take any measures to protect this vast domain? Fortunately we find this question answered by this court in the case of *Wells* v. *Nickles, 104 U. S. 444.* That was a case in which a class of men appointed by local land officers, under instructions from the Secretary of the Interior, having found a large quantity of this timber cut down from the forests of the United States and lying where it was cut, seized it. The question of the title to this property coming in controversy between Wells and Nickles, it became essential to inquire into the authority of these timber agents of the government thus to seize the timber cut by trespassers on its lands. The court said: 'The effort we have made to ascertain and fix the authority of these timber agents by any positive provision of law has been unsuccessful.' But the court, notwithstanding there was no special statute for it, held that the Department of the Interior, acting under the idea of protecting from depredation timber on the lands of the government, had gradually come to assert the right to seize what is cut and taken away from them wherever it can be traced, and in aid of this the registers and receivers of the Land Office had, by instructions from the Secretary of the Interior, been constituted agents of the United States for these purposes, with power to appoint special agents under themselves. And the court upheld the authority of the Secretary of the Interior to make these rules and regulations for the protection of the public lands."

As bearing on the right to yield such protection in anticipation of a public injury, that great jurist

further said in the opinion which we are now discussing (*p. 59*):

"It has in modern times become apparent that the physical health of the community is more efficiently promoted by hygienic and preventive means, than by the skill which is applied to the cure of disease after it has become fully developed. So also the law, which is intended to prevent crime, in its general spread among the community, by regulations, police organization, and otherwise, which are adapted for the protection of the lives and property of citizens, for the dispersion of mobs, for the arrest of thieves and assassins, for the watch which is kept over the community, as well as over this class of people, is more efficient than punishment of crimes after they have been committed."

With these principles in mind, let us now consider briefly the authorities which demonstrate that the destruction of the birds means the annihilation of the national forests and the depreciation in value of that portion of the public lands adaptable for agriculture, arboriculture and horticulture.

(3) *The necessity of bird life to the continuance of vegetable life.*

This subject is treated exhaustively by Mr. Edward H. Forbush, the Ornithologist of the Massachusetts State Board of Agriculture, in his illuminating book entitled "*Useful Birds and Their Protection,*" the Fourth Edition of which was published by authority of the Legislature of Massachusetts. He demonstrates the economic value of birds to man, by showing that it is solely through the agency of the birds that a proper

balance of life is maintained between the tree crop and the plant crop, the insect and the bird. He shows, on pp. 35, 36 that in 1904 the Bureau of Statistics of the United States Department of Agriculture gave the loss from insect depredations for that year as $795,100,000, and that in Massachusetts ten per cent. of the value of the product of the soil was destroyed by insects annually. The capacity of the birds to destroy insects and to keep their numbers within bounds is indicated by startling figures. On pages 63-72 striking examples are given of the manner in which birds have destroyed invasions of locusts and grasshoppers, and it is shown that in this work of destruction all kinds of birds participate —fish-eating birds, like the Great Blue Heron; flesh-eating birds, like the Hawks and Owls; shore-birds, like Snipe, Plover, Woodcock, Sandpipers, Curlews; likewise Ducks, Geese, Coots and Gulls; Blackbirds, Prairie Chickens, Quail, *and all the song birds.* The following extracts from these pages are important:

"The Australian correspondence of the Mark Lane Express of March 7, 1892, had a paragraph relating to the value of the Ibis to farmers during the locust invasions of that year and the year previous. In the Glen Thompson District several large flocks, one said to number fully five hundred birds, were seen eating the young locusts in a wholesome manner. Other insectivorous birds were flourishing upon the same diet. Near Ballarat, Victoria, a swarm of locusts was noted in a paddock; and just as it was feared that all the sheep would have to be sold for want of grass, flocks of Starlings, Spoonbills, Cranes, made their appearance and in a few days made so complete a destruction of the locusts that only about forty acres of grass were lost.

"American farmers have had many similar experiences. When the Mormons first settled in Utah their crops were almost utterly destroyed by myriads of crickets that came down from the mountains. Hon. George Q. Cannon, as temporary chairman of the Third Irrigation Congress, told how it happened. The first year's crop having been destroyed, the Mormons had sowed seed the second year. The crop promised well, but when again the crickets appeared, the people were in danger of starvation. In describing the conditions in 1848 Mr. Cannon says:

'Black crickets came down by millions and destroyed our grain crops; promising fields of wheat in the morning were by evening as smooth as a man's hand,—devoured by the crickets. * * * At this juncture sea gulls came by hundreds and thousands, and before the crops were entirely destroyed these gulls devoured the insects, so that our fields were entirely freed from them. * * * The settlers at Salt Lake regarded the advent of the birds as a heaven-sent miracle. * * * I have been along the ditches in the morning and have seen lumps of these crickets vomited up by the gulls, so that they could again begin killing.'

"Similar services were performed by birds during the great locust ravages which followed the settlement of the Mississippi Valley. When large swarms of locusts appeared, nearly all birds, from the tiny Kinglet to the whooping Crane, fed on them. Fish-eating birds, like the Great Blue Heron, flesh-eating birds, like the Hawks and Owls, shore-birds, Ducks, Geese, Gulls—all joined with the smaller land birds in the general feast. Professor Samuel Aughey learned this by dissecting birds and observing their feeding habits in Nebraska. In a paper published by him in 1877, but not often quoted, he gives some of the practical results of the work done by birds in protecting crops from the mighty swarms of locusts which were devastating most of that region. He says:

"'In the spring of 1865 the locusts hatched out in countless numbers in northeastern Nebraska. Very few fields of corn and the cereal grains escaped some damage. Some fields were entirely destroyed, while others were hurt to the amount of from ten to seventy-five per cent. One field of corn northwest of Dakota City was almost literally covered with locusts, and there the indications were that not a stalk would escape. After, and about the time the corn was up, the yellow-headed Blackbirds in large numbers made this field their feeding ground. Visiting the field frequently, I could see a gradual diminution of the number of the locusts. Other birds, especially the Plovers, helped the yellow-heads; and although some of the corn had to be replanted at once, yet it was the birds that made the crop that was raised possible at all. During the same season I visited Pigeon Creek Valley, in this county, and I found among the eaten-up wheat fields one where the damage done was not over five per cent. The Irishman who pointed it out to me ascribed it to the work of the birds, chief among which were the Blackbirds and Plover, with a few Quail and Prairie Chickens.'

"Professor Aughey speaks of a locality where, on several oil fields, locusts hatched to the number of about three hundred to the square foot. Birds soon found them, and the ground was frequented by Blackbirds, Plover, Curlews, Prairie Chickens and small land birds. Long before the middle of June most of the locusts had disappeared. In 1886 locusts, he says, invaded Cedar and Dixon counties in swarms that darkened the sun. Nevertheless, at one point under observation the great number of birds that attacked these insects very materially lessened their numbers. In 1869 more than ninety per cent. of the locusts in one neighborhood were destroyed, apparently by birds, in one week."

On pages 72-76 the author establishes that an increase of injurious insects immediately follows

the destruction of birds. On pages 80, 81 he shows that water birds and shore birds are insectivorous. Pages 90-110 are especially devoted to a discussion of the utility of birds in woodlands, and make clear beyond any doubt that the birds are guardians of the trees, or as Henshaw aptly terms them "the policemen of the air." Chapter III discusses birds as destroyers of caterpillars and plant lice. Chapter IV deals with the economic service of the birds in the orchard; and other chapters describe the various species of birds and give valuable information as to the extent to which they serve as the protectors of plant life.

Additional information respecting the indispensable function performed by birds of practically every species in the preservation of the various forms of vegetation is to be found in a recent article by Professor W. L. McAtee of the Biological Survey of the United States Department of Agriculture, entitled *"Bird Enemies of Forest Insects,"* published in Vol. 21 of American Forestry, pp. 681 to 691.

Particular attention is directed to "Hornaday's Wild Life Conservation," a series of lectures delivered before the Forest School of Yale University in 1914, and especially to Chapter II, pp. 44-83, entitled "The Economic Value of our Birds," which is most illuminating. On page 55 the author says:

"There are five groups of birds of special value to us because of the insects they consume; and they will be named in what we believe to be the order of their importance. They are: The song birds, the tree-climbers, the swallows and swifts, the shore-birds, the Grouse and Quail. To these are to be added a number of miscellaneous spe-

cies of special value, such as the Goatsuckers, certain small gulls, and a few ducks, egrets, herons and ibises."

In the magazine known as "American Forestry," for July, 1915, at page 792, a writer discussing this subject says:

"The public is slowly beginning to know that man needs and must have the birds to protect his fields, orchards, and shade trees, night and day, or they will be destroyed. All the devices and inventions yet produced are unable to cope with the outbreaks of insects which occur continually in all parts of this country; for the insect literally dominates the earth. Instances can be cited where large flocks of birds have destroyed huge swarms of insects and saved men from ruin and possible starvation. When one is reminded of the fact that there are over 300,000 'vegetation eaters' known to scientists, and probably twice that number still unknown, that these pests feed on practically all varieties of plants, and that with their reproductive powers a single pair like the gypsy moth can produce enough young in eight years to destroy all the foliage in the United States, it is not over-estimating the situation when I repeat that the insect dominates the earth."

On page 794 the writer says:

"The insect, its eggs and young are the natural food of many birds, and the amount that they and their young consume is astonishing. The young eat as much in proportion to their size as their parents do. A young robin has been known to eat one-half its weight in meat a day in captivity, and from fifty to seventy cut worms and earth worms a day. The stomachs of two flickers that were examined were found to contain 3,000 and 5,000 ants, respectively. One night hawk had

eaten 500 mosquitoes. A yellow-billed cuckoo, eighty-two caterpillars, another eighty-six caterpillars. Two scarlet tanagers ate thirty-five gipsy moths per minute for eighteen minutes. It is estimated that 21,000 tons of insects are eaten each season in Massachusetts."

In "American Forestry" for August, 1915, at page 845, Mr. Allen, the distinguished ornithologist, says:

"There are few people today who are informed as to the value of birds. The annual loss of over seven hundred millions of dollars to agriculture in this country due to the ravages of insects and the part taken by the birds in destroying these pests are familiar facts. The birds are nature's guards, appointed to keep the wonderfully prolific insects from overrunning the earth, and, when one stops to consider that a single pair of potato beetles, if uncontrolled, would at the end of a single season result in sixty million offspring; or that a single female plant louse could give rise in the twelve generations which occur each year to over ten sextillion young, one is forced to acknowledge the invaluable asset we have in the birds.

"In the garden, however, and in the orchard, it is usually possible by artificial means to battle successfully with insects. Poisonous sprays and cleverly contrived traps with sufficient output of time, labor and expense, will, in most cases, keep the farm in profitable condition. But the whole world is not a garden. It is obviously impossible to exterminate all insects. Human ingenuity will never devise profitable means for spraying the forests or trapping the forest insects. Over 500 species of insects prey upon the oak trees alone and nearly 300 upon the conifers, any one of which, if left uncontrolled, would destroy the trees. * * *

"Again, in Dakota, where the first attempts

were made to grow trees upon the prairie lands, the experiments resulted nearly in failure because of the ravages of this silk worm and closely allied caterpillars, the reason for their destructive numbers being the absence of arboreal birds. This is a problem which always presents itself in the reclamation of waste lands by the planting of trees where tree-frequenting birds are not yet established. It is fortunate that many birds are quick to avail themselves of new territory and that a number of species have extended their ranges during recent years, following the reclamation of arid country."

In a recent work entitled *"Our Vanishing Wild Life,"* whose author, Dr. W. T. Hornaday, is the Director of the Zoological Park of New York, much valuable information bearing on this subject is to be found. In Chapter 22 he discusses our annual losses by insects, and in Chapter 23 the economic value of birds. The entire book might be read to advantage. We shall content ourselves with calling attention to a number of striking facts which the author collates, principally derived from official reports issued by the Department of Agriculture. He shows that insects cause an annual loss of eight per cent. of the corn crop, making an aggregate on the basis of pre-war prices of $80,000,000. The insects which attack the wheat crops on the same basis cause an annual loss of $100,000,000. The loss in grasses and forage plants occasioned by locusts, grasshoppers and other insects produces a shrinkage of ten per cent. The boll weevil and the boll worm alone injure the cotton crop to the extent of at least four per cent. annually. The loss to apple growers, due to the codling moth, reaches $20,000,000 a year, and frequently a much

larger sum in sections of the Pacific Northwest (*pp. 208 to 210*).

As to the forests the author says (*pp. 210, 211*):

"The annual losses occasioned by insect pests to forests and forest products in the United States have been estimated by Dr. A. D. Hopkins, special agent in charge of forest insect investigations, at not less than $100,000,000. * * * It covers both the loss from insect damages to standing timber and to the crude and manufactured forest products. The annual loss to growing timber is conservatively placed at $70,000,000."

It appears from a table taken from the Year Book of the Department of Agriculture for 1904 that the total loss occasioned by insects, to the products of vegetation is calculated at $795,000,000 (*page 212*).

The author then proceeds to show the value of birds in counteracting the ravages of the insect world. On page 213 he makes this remarkable statement:

"In view of the known value of the remaining trees of our country, each woodpecker in the United States is worth twenty dollars in cash. Each nuthatch, creeper and chickadee is worth from five to ten dollars, according to local circumstances. You might just as well cut down four twenty-inch trees and let them lie and decay as to permit one woodpecker to be killed and eaten by an Italian in the North, or a negro in the South. The downy woodpecker is the relentless enemy of the codling moth, an insect that annually inflicts upon our apple crop damages estimated by the experts in the U. S. Department of Agriculture at twenty million dollars!"

He then proceeds to demonstrate the usefulness of birds in the war against the cotton boll weevil and against the various insects that prey upon our forests, our orchards, our gardens, and our agricultural crops (*pp. 215 to 226*).

Because of the fact that a large number of birds that are hunted for food are among the most useful protectors of vegetation, it is deemed important to quote in full in Appendix A what the author says concerning Shore Birds. This is especially pertinent, since the amended bill of complaint in this action refers to snipe and plover as beyond the pale of Federal protection. As will be seen however, these birds perform a most valuable service in preserving the national domain.

Attention is likewise directed to an article entitled *"The Value of Birds to Man,"* by James Buckland, which is to be found in the *Smithsonian Report for 1913 at page 439-458.*

The anatidae, which include ducks, geese and swans, are likewise insectivorous, probably not to the same extent as song birds and shore birds, but nevertheless to such a degree as to make their contribution to the diminution of insect depredations of considerable consequence. This is especially emphasized by the fact that, on occasions when insects have invaded various sections of the country in unusual numbers, the anatidae have united with other birds in repelling the invasion. This was pointed out by Prof. Samuel Aughey in the first report of the United States Entomologi cal Commission, published in 1877, where he showed that geese, teal and ducks, including mallard, wood and ruddy ducks, had been active in the destruction of locusts.

In Bulletin No. 720 issued by the United States Department of Agriculture on December 23, 1918, on the *"Food Habits of the Mallard Ducks of the United States,"* the insectivorous qualities of ducks are discussed. While a large part of the insects eaten by them are more or less aquatic in

habits, they by no means confine themselves to insects of that character. They are the effective enemies of ants, grasshoppers, crickets and beetles. The report includes a table itemizing the kinds of animal food identified in the stomachs of mallard ducks. Under the head of insects there are found, among others, grasshoppers, treehoppers, oak caterpillars, beetles of various kinds, including leaf chafers and leaf beetles; also weevils. The report also shows that black ducks have practically the same feeding habits as the mallard ducks.

All kinds of wild ducks and geese likewise feed on crawfish, which, as is shown in a paper entitled "*Crawfish as Crop Destroyers,*" written by A. K. Fisher, in charge of economic investigations in the Bureau of Biological Survey, and which appeared in the Year Book of the Department of Agriculture for 1911, are especially destructive of cotton, rice and corn crops.

Wild ducks and geese are likewise most destructive of mosquitoes. Dr. Thomas S. Roberts, Curator of the Zoological Museum of the University of Minnesota, in the Biennial Report of the State Fish and Game Commissioners of that State for the period ending July 31, 1918, says:

> "The late Dr. Samuel G. Dixon, while Health Commissioner of Pennsylvania, published an article in the Journal of the American Medical Association for October 3, 1914, detailing results of experiments made by him along this line. Two dams were constructed on a stream so that the ponds would present exactly the same conditions. One was stocked with gold fish and in the other twenty mallard ducks were allowed to feed. After several months the duck pond was entirely free from mosquitoes while the fish pond was swarming

with young insects in different cycles of life. The well-fed mallards were then admitted to the infested pond. At first they were attracted by the tadpoles but soon recognized the presence of larvae and pupae of the mosquito and immediately turned their attention to these, ravenously devouring them in preference to any other food present. At the end of twenty-four hours no pupae were to be found and in forty hours only a few small larvae survived. He adds: 'For some years I have been using ducks to keep down mosquitoes in swamps that would have been expensive to drain, but I never fully appreciated the high degree of efficiency of the duck as a destroyer of mosquito life until the foregoing test was made.'"

Although it may be conceded that all birds are not equally effective in the destruction of insects, almost every bird in its way contributes to the protection of vegetable life in some degree. That in itself is a sufficient basis for the adoption of the rules and regulations embodied in the Migratory Bird Treaty Act and elaborated by the Secretary of Agriculture in accordance with the requirements of that act.

As indicative of the recognition by Congress of the grave danger to field and forest from the ravages of insects, it is noteworthy that for more than thirty years it has made constantly increasing appropriations for the maintenance first of the Division and later of the Bureau of Entomology, which to use the terms of some of the appropriation bills are especially intended to investigate "the history and the habits of insects injurious and beneficial to agriculture, horticulture, arboriculture, and the study of insects affecting the health of man and domestic animals, and ascer-

taining the best means of destroying those found to be injurious; for collating, digesting, reporting, and illustrating the results of such investigations."

Thus, for sake of illustration, we refer to the Agricultural Appropriation Bill of 1914 (Statutes, Sixty-third Congress, Second Session, Part 1, 1913-1914, p. 433) enacted shortly before the negotiations for the convention relating to the protection of migratory birds were undertaken. The total amount appropriated for the general purpose of the Bureau during that session was $450, 370, of which $114,500 was for investigations of insects affecting cereal and forage crops, $58,000 for investigations of insects affecting deciduous fruits, orchards, vineyards and nuts, $59,000 for investigations of insects affecting Southern field crops, including insects affecting cotton, tobacco, rice and sugar cane, and $54,790 for investigations of insects affecting forests. In addition to these appropriations there was a special one of $310,000 "to meet the emergency caused by the continued spread of the gypsy and brown-tail moths by conducting such experiments as may be necessary to determine the best methods of controlling these insects; by introducing and establishing the parasites and natural enemies of these insects and colonizing them within the infested territory."

Similar appropriations were made for like purposes and in progressively increasing amounts, in practically the same language, in other years the amounts appropriated in the earlier years being considerably less and the purposes of the investigations being less extensive and comprehensive

than in the later years. Among them attention is directed to the following:

26 St. L. (1889-1891) 285, 1047.
27 St. L. (1891-1893) 737.
28 St. L. (1893-1895) 267, 730.
29 St. L. (1895-1897) 102.
30 St. L. (1897-1899) 4, 333, 951.
31 St. L. (1899-1901) 495, 932.
32 St. L. (1901-1903) 298, 1160.
33 St. L. (1903-1905) Part 1, 289, 290, 876.
34 St. L. (1905-1907) Part 1, 688, 1273, 1274.
35 St. L. 1907-1908) Part 1, 262, 1050.
36 St. L., Part 1, 2nd Session, 433.
36 St. L., Part 1, 3rd Session, 1256, 1257.
37 St. L., Part 1, 2nd Session, 291.
38 St. L., 3rd Session, 845, 846.
Sixty-third Congress, 3rd Session, Part 1, 1103, 1104.
Sixty-fourth Congress, 1st Session, Part 1, 465, 466.
Sixty-fourth Congress, 2nd Session, Part 1, 1153, 1154.
Sixty-fifth Congress, 2nd Session, Part 1, 993, 994.

The necessity of the preservation of bird life to the continuance of the life of our national forests, and of the preservation of our agricultural resources or, in other words, the dependence of forest and plant life upon bird life, is thus demonstrated. The vast national domain which lies within the boundaries of a majority of the States of the Union, the value of which to the Government of the United States is

measured by billions of dollars, is certain of preservation if the birds visiting them are preserved, and is equally certain of destruction and ruin if the birds are permitted to be destroyed. If Congress may, as was declared in *Camfield* v. *United States, supra,* exercise the police power for the purpose of protecting the possession and enjoyment of public lands and the prevention of aggression by acts committed on private property, then it would seem to follow inevitably that Congress may, in order to prevent not merely a trespass or an act of aggression, but the annihilation of the national forests, which constitute an empire in themselves, prohibit the wanton destruction of an existing agency, coeval with the forests, and created by Providence for their perpetuation.

In a word: The slaughter of the birds means the death of the forests and of plant life. Can Congress, under its power to make needful rules and regulations respecting the forests and other lands as property belonging to the United States, keep alive the forests and preserve for agriculture the vast areas adapted to that object, by preventing the slaughter of the birds?

(4) *The fact that the States are trustees of animals ferae naturae within their boundaries, does not prevent the United States from preserving such animals for the purpose of protecting its property.*

Applying the decisions in *Geer* v. *Connecticut, 161 U. S. 519* and *Ward* v. *Race Horse, 163 U. S. 504,* literally, the power of a State to preserve fish and game within its borders does not militate against the power conferred on Congress by Sec-

tion 3 of Article IV of the Constitution to protect the property belonging to the United States, where that is sought to be accomplished by a law enacted, not to destroy, but to preserve birds. The powers of Congress would merely supplement the powers of the State, both being enacted to accomplish the common end of preservation and conservation.

This was apparently recognized in *Kennedy* v. *Becker, 241 U. S. 562,* where it was said:

"It is not to be doubted that the power to preserve fish and game within its borders is inherent in the sovereignty of the State (Geer *v.* Connecticut, 161 U. S. 519; Ward *v.* Racehorse, 163 U. S. 504, 507), *subject of course to any valid exercise of authority under the provisions of the Federal Constitution.*"

The act now under consideration was, we contend, the valid exercise of authority under Section 3 of Article IV of the Constitution, as uniformly interpreted. Under Article VI of the Constitution, no State can interfere with the free and unembarrassed exercise by the National Government of all of the powers conferred upon it. As declared in that Article:

"This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

Quoting the memorable words of Mr. Justice Johnson in *Martin* v. *Hunter, 1 Wheaton 303,* that "the general government must cease to exist whenever it loses the power of protecting itself in

the exercise of its constitutional powers," Mr. Justice Strong in *Tennessee* v. *Davis, 100 U. S. 263,* laid down the basic principle:

"The United States is a government with authority extending over the whole territory of the Union, acting upon the States and upon the people of the States. While it is limited in the number of its powers, so far as its sovereignty extends it is supreme. No State government can exclude it from the exercise of any authority conferred upon it by the Constitution, obstruct its authorized officers against its will, or withhold from it, for a moment, the cognizance of any subject which that instrument has committed to it."

Referring to these words, Mr. Justice Miller *in re Neagle, 135 U. S. 62,* added:

"To cite all the cases in which this principle of the supremacy of the government of the United States, *in the exercise of all the powers conferred upon it by the Constitution,* is maintained, would be an endless task."

He also quoted from the opinion of Mr. Justice Bradley in *Ex parte Siebold, 100 U. S. 371, 394*:

"Somewhat akin to the argument which has been considered is the objection that the deputy marshals authorized by the act of Congress to be created and to attend the elections are authorized to keep the peace; and that this is a duty which belongs to the State authorities alone. It is argued that the preservation of peace and good order in society is not within the powers confided to the government of the United States, but belongs exclusively to the States. Here again we are met with the theory that the government of the United States does not rest upon the soil and territory of the country. We think that this theory is founded on an entire misconception of the nature and powers of that government. We hold it to be an in-

controvertible principle that the government of the United States may by means of physical force, exercised through its official agents, execute on every foot of American soil the powers and functions that belong to it. This necessarily involves the power to command obedience to its laws, and hence the power to keep the peace to that extent."

The language of Mr. Justice Brewer in *South Carolina v. United States, 199 U. S. 437, 452,* is a worthy commentary on this clause of the Constitution:

"In other words, the two governments, National and State, are each to exercise their powers so as not to interfere with the free and full exercise by the other of its powers. This proposition, so far as the Nation is concerned, was affirmed at an early day in the great case of *McCulloch v. Maryland, 4 Wheat. 316,* in which it was held that the State had no power to pass a law imposing a tax upon the operations of a national bank."

The doctrine was announced that, while the State of South Carolina had the right to control the sale of liquor within its jurisdiction by the dispensary system, when it was engaged in that business it became subject to the operation of the taxing power of the National Government, and the conflict between the Federal taxing power and the exemption of the State from the operation of such power, was resolved by an interpretation which favored the contention of the Federal Government. In the course of his opinion Mr. Justice Brewer laid down rules of interpretation which are applicable here. He said:

"We have in this Republic a dual system of government, National and State, each operating

within the same territory and upon the same persons; and yet working without collision, because their functions are different. There are certain matters over which the National Government has absolute control and no action of the State can interfere therewith, and there are others in which the State is supreme, and in respect to them the National Government is powerless. To preserve the even balance between these two governments and hold each in its separate sphere is the peculiar duty of all courts, preeminently of this—a duty oftentimes of great delicacy and difficulty. Two propositions in our constitutional jurisprudence are no longer debatable. One is that the National Government is one of enumerated powers, and the other that a power enumerated and delegated by the Constitution to Congress is comprehensive and complete, without other limitations than those found in the Constitution itself. The Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted it means now. Being a grant of powers to a government its language is general, and as changes come in social and political life it embraces in its grasp all new conditions which are within the scope of the powers in terms conferred. In other words, while the powers granted do not change, they apply from generation to generation to all things to which they are in their nature applicable."

Again, at page 456, it is said:

"In other words, we are to find in the Constitution itself the full protection to the Nation, and not to rest its sufficiency on either the generosity or the neglect of any State."

Applying this language to the present case, we find an explicit provision in the Federal Constitution which gives to Congress the power to legislate for the protection and preservation of the prop-

erty of the United States. The power thus conferred covers all matters which are implied, though not expressed.

Ex parte Yarbrough, 110 U. S. 651, 658.

This naturally means that, if it is necessary for the protection and preservation of the public domain to exercise the police power as defined in *Camfield* v. *United States supra*, that power may be validly exercised. The mere fact that the States may likewise legislate on the same subject, does not curtail the power of Congress to exercise the authority thus expressly, and by implication, conferred upon it. Congress may view the subject from a broader standpoint than any of the States. Presumptively it has regard for the interests of all the people of all the States, while the Legislature of one of the States is apt to consider merely what it conceives to be the interests of its own citizens, regardless of the needs of the Nation. The latter must, under such conditions, be supreme. Thus, for instance, if Arkansas, Florida, Missouri, or Montana, were the breeding places of migratory insectivorous birds, and the laws of those States were silent on the subject of the preservation of such birds or should be so inadequate as to encourage their indiscriminate slaughter, can the welfare of the Nation as regards the public domain be jeopardized by the failure of one or all of these four States to legislate for the preservation of such birds, or because of the adoption of a lax system of laws for the protection and preservation of the birds whose lives are a guaranty of the safety of the forests and other parts of the public domain from the attacks of the countless myriads of hostile insects?

There is nothing in *Kansas* v. *Colorado, 206 U. S. 46,* that militates against our contention here. There, the power which was sought to be attributed to the Government of the United States is not to be found, either expressly or by implication, among the enumerated powers contained in the Constitution. Although the second paragraph of Section 3 of Article IV was invoked, it was shown that it did not grant the power sought to be exercised. As Mr. Justice Brewer, discussing this proposition, pointed out:

"The full scope of this paragraph has never been definitely settled. *Primarily, at least, it is a grant of power to the United States of control over its property.* That is implied by the words 'territory or other property.' It is true it has been referred to in some decisions as granting political and legislative control over the Territories as distinguished from the States of the Union. It is unnecessary in the present case to consider whether the language justifies this construction. *Certainly we have no disposition to limit or qualify the expressions which have heretofore fallen from this court in respect thereto. But clearly it does not grant to Congress any legislative control over the States, and must, so far as they are concerned, be limited to authority over the property belonging to the United States within their limits.*"

That is as far as we seek to go in the present case. We assert that the power that Congress has exercised goes no farther than is required for the protection of the property belonging to the United States. That can only be accomplished by regulating the taking of migratory birds in the manner set forth in the act and the regulations now under consideration.

In *Carey* v. *South Dakota, 250 U. S. 118,* this Court, as did the Supreme Court of South Dakota, expressly refrained from passing on the constitutionality of the Migratory Bird Act of March 4, 1913. Assuming that statute to be valid, it was decided that the law of South Dakota, which forbade the shipment by a carrier of wild ducks, which was applicable whether the birds were taken lawfully or unlawfully or shipped in open or closed season, was not inconsistent with the Federal Migratory Bird Act and the regulations of the Department of Agriculture adopted thereunder, since that act prohibited only the destruction or taking of birds contrary to the regulations, and neither the act nor the regulations dealt with the subject of shipping.

II.

It is respectfully submitted that the judgment of the United States District Court should be affirmed.

Louis Marshall,
of Counsel for the Association for the Preservation of the Adirondacks, *Amicus Curiae.*

APPENDIX A.

Being a reprint of pages 227 to 233 of Dr. W. T. Hornaday's book, "Our Vanishing Wild Life." These pages relate exclusively to Shore Birds, including Snipe and Plover, referred to in the Amended Complaint in this action:

THE SHORE BIRDS.—Who is there who thinks of the shore-birds as being directly beneficial to man by reason of their food habits? I warrant not more than one man in every ten thousand! We think of them only as possible "food." The amount of actual cash value benefit that the shore-birds confer upon man through the destruction of bad things is, in comparison with the number of birds, enormous.

The Department of Agriculture never publishes and circulates anything that has already been published, no matter how valuable to the public at large. Our rules are different. Because I know that many of the people of our country need the information, I am going to reprint here, as an object lesson and a warning, the whole of the Biological Survey's valuable and timely circular No. 79, issued April 11, 1911, and written by Prof. W. L. McAtee. It should open the eyes of the American people to two things: the economic value of these birds, and the fact that they are everywhere far on the road toward extermination!

OUR VANISHING SHOREBIRDS.

By Prof. W. L. McAtee.

The term shorebird is applied to a group of long-legged, slender-billed, and usually plainly colored

51

birds belonging to the order Limicolæ. More than sixty species of them occur in North America. True to their name, they frequent the shores of all bodies of water, large and small, but many of them are equally at home on plains and prairies.

Throughout the eastern United States shorebirds are fast vanishing. While formerly numerous species swarmed along the Atlantic coast and in the prairie regions, many of them have been so reduced that extermination seems imminent. The black-bellied plover or beetlehead, which occurred along the Atlantic seaboard in great numbers years ago, is now seen only as a straggler. The golden plover, once exceedingly abundant east of the Great Plains, is now rare. Vast hordes of long-billed dowitchers formerly wintered in Louisiana; now they occur only in infrequent flocks of a half dozen or less. The Eskimo curlew within the last decade has probably been exterminated and the other curlews greatly reduced. In fact, all the larger species of shorebirds have suffered severely.

So adverse to shorebirds are present conditions that the wonder is that any escape. In both fall and spring they are shot along the whole route of their migration north and south. Their habit of decoying readily and persistently, coming back in flocks to the decoys again and again, in spite of murderous volleys, greatly lessens their chances of escape.

The breeding grounds of some of the species in the United States and Canada have become greatly restricted by the extension of agriculture, and their winter ranges in South America have probably been restricted in the same way.

Unfortunately, shorebirds lay fewer eggs than any of the other species generally termed game

birds. They deposit only three or four eggs, and hatch only one brood yearly. Nor are they in any wise immune from the great mortality known to prevail among the smaller birds. Their eggs and young are constantly preyed upon during the breeding season by crows, gulls, and jaegers, and the far northern country to which so many of them resort to nest is subject to sudden cold storms, which kill many of the young. In the more temperate climate of the United States small birds, in general, do not bring up more than one young bird for every two eggs laid. Sometimes the proportion of loss is much greater, actual count revealing a destruction of 70 to 80 per cent of nests and eggs. Shorebirds, with sets of three or four eggs, probably do not on the average rear more than two young for each breeding pair.

It is not surprising, therefore, that birds of this family, with their limited powers of reproduction, melt away under the relentless warfare waged upon them. Until recent years shorebirds have had almost no protection. Thus, the species most in need of stringent protection have really had the least. No useful birds which lay only three or four eggs should be retained on the list of game birds. The shorebirds should be relieved from persecution, and if we desire to save from extermination a majority of the species, action must be prompt.

The protection of shorebirds need not be based solely on esthetic or sentimental grounds, for few groups of birds more thoroughly deserve protection from an economic standpoint. Shorebirds perform an important service by their inroads upon mosquitoes, some of which play so conspicuous a part in the dissemination of diseases. Thus, nine species are known to feed upon mosquitoes,

and hundreds of the larvæ or "wigglers" were found in several stomachs. Fifty-three per cent of the food of twenty-eight northern phalaropes from one locality consisted of mosquito larvæ. The insects eaten include the salt-marsh mosquito (*Aedes sollicitans*), for the suppression of which the State of New Jersey has gone to great expense. The nine species of shorebirds known to eat mosquitoes are:

Northern phalarope (*Lobipes lobatus*).
Wilson phalarope (*Steganopus tricolor*).
Stilt sandpiper (*Micropalama himantopus*).
Pectoral sandpiper (*Pisobia maculata*).
Baird sandpiper (*Pisobia bairdi*).
Least sandpiper (*Pisobia minutilla*).
Semipalmated sandpiper (*Ereunetes pusillus*).
Killdeer (*Oxyechus vociferus*).
Semipalmated plover (*Aegialitis semipalmata*).

Cattle and other live stock also are seriously molested by mosquitoes as well as by another set of pests, the horse-flies. Adults and larvæ of these flies have been found in the stomachs of the dowitcher, the pectoral sandpiper, the hudsonian godwit, and the killdeer. Two species of shorebirds, the killdeer and upland plover, still further befriend cattle by devouring the North American fever tick.

Among other fly larvæ consumed are those of the crane flies (leather-jackets) devoured by the following species:

Northern phalarope (*Lobipes lobatus*).
Wilson phalarope (*Steganopus tricolor*).
Woodcock (*Philohela minor*).
Jacksnipe (*Gallinago delicata*).
Pectoral sandpiper (*Pisobia maculata*).
Baird sandpiper (*Pisobia bairdi*).
Upland plover (*Bartramia longicauda*).
Killdeer (*Oxyechus vociferus*).

Crane-fly larvæ are frequently seriously destructive locally in grass and wheat fields. Among their numerous bird enemies, shorebirds rank high.

Another group of insects of which the shorebirds are very fond is grasshoppers. Severe local infestations of grasshoppers, frequently involving the destruction of many acres of corn, cotton, and other crops, are by no means exceptional. Aughey found twenty-three species of shorebirds feeding on Rocky Mountain locusts in Nebraska, some of them consuming large numbers, as shown below.

9 killdeer stomachs contained an average of 28 locusts each.
11 semipalmated plover stomachs contained an average of 38 locusts each.
16 mountain plover stomachs contained an average of 45 locusts each.
11 jacksnipe stomachs contained an average of 37 locusts each.
22 upland plover stomachs contained an average of 36 locusts each.
10 long-billed curlew stomachs contained an average of 48 locusts each.

Even under ordinary conditions grasshoppers are a staple food of many members of the shorebird family, and the following species are known to feed on them:

Northern phalarope (*Lobipes lobatus*).
Avocet (*Recurvirostra americana*).
Black-necked stilt (*Himantopus mexicanus*).
Woodcock (*Philohela minor*).
Jacksnipe (*Gallinago delicata*).
Dowitcher (*Macorhamphus griseus*).
Robin snipe (*Tringa canutus*).
White-rumped sandpiper (*Pisobia fuscicollis*).

Baird sandpiper (*Pisobia bairdi*).
Least sandpiper (*Pisobia minutilla*).
Buff-breasted sandpiper (*Tryngites subruficollis*).
Spotted sandpiper (*Actitis macularia*).
Long-billed curlew (*Numenius americanus*).
Black-bellied plover (*Squatarola squatarola*).
Golden plover (*Charadrius dominicus*).
Killdeer (*Oxyechus vociferus*).
Semipalmated plover (*Aegialitis semipalmata*).
Marbled godwit (*Limosa fedoa*).
Yellowlegs (*Totanus flavipes*).
Solitary sandpiper (*Helodromas solitarius*).
Ringed plover (*Aegialitis hiaticula*).
Mountain plover (*Podasocys montanus*).
Turnstone (*Arenaria interpres*).
Upland plover (*Bartramia longicauda*).

Shorebirds are fond of other insect pests of forage and grain crops, including the army worm, which is known to be eaten by the killdeer and spotted sandpiper; also cutworms, among whose enemies are the avocet, woodcock, pectoral and Baird sandpipers, upland plover, and killdeer. Two caterpillar enemies of cotton, the cotton worm and the cotton cutworm, are eaten by the upland plover and killdeer. The latter bird feeds also on caterpillars of the genus *Phlegthontius*, which includes the tobacco and tomato worms.

The principal farm crops have many destructive beetle enemies also, and some of these are eagerly eaten by shorebirds. The boll weevil and clover-leaf weevil are eaten by the upland plover and killdeer, the rice weevil by the killdeer, the cowpea weevil by the upland plover, and the clover-root curculio by the following species of shorebirds:

Northern phalarope (*Lobipes lobatus*).
Pectoral sandpiper (*Pisobia maculata*).
Baird sandpiper (*Pisobia bairdi*).
White-rumped sandpiper (*Pisobia fuscicollis*).
Upland plover (*Bartramia longicauda*).
Killdeer (*Oxyechus vociferus*).

The last two eat also other weevils which attack cotton, grapes and sugar beets. Bill-bugs, which often do considerable damage to corn, seem to be favorite food of some of the shorebirds. They are eaten by the Wilson phalarope, avocet, black-necked stilt, pectoral sandpiper, killdeer, and upland plover. They are an important element of the latter bird's diet, and no fewer than eight species of them have been found in its food.

Wireworms and their adult forms, click beetles, are devoured by the northern phalarope, woodcock, jacksnipe, pectoral sandpiper, killdeer, and upland plover. The last three feed also on the southern corn leaf-beetle and the last two upon the grapevine colaspis. Other shorebirds that eat leaf-beetles are the Wilson phalarope and dowitcher.

Crayfishes, which are a pest in rice and corn fields in the South and which injure levees, are favorite food of the black-necked stilt, and several other shorebirds feed upon them, notably the jacksnipe, robin snipe, spotted sandpiper, upland plover, and killdeer.

Thus it is evident that shorebirds render important aid by devouring the enemies of farm crops and in other ways, and their services are appreciated by those who have observed the birds in the field. Thus W. A. Clark, of Corpus Christi, Tex., reports that upland plovers are industrious in following the plow and in eating the grubs that destroy garden stuff, corn, and cotton crops. H. W. Tinkham, of Fall River, Mass., says of the spotted sandpiper: "Three pairs nested in a young orchard behind my house and adjacent to my garden. I did not see them once go to the shore for food (shore about 1,500 feet away), but

I did see them many times make faithful search of my garden for cutworms, spotted squash bugs, and green flies. Cutworms and cabbage worms were their special prey. After the young could fly, they still kept at work in my garden, and showed no inclination to go to the shore until about August 15th. They and a flock of quails just over the wall helped me wonderfully."

In the uncultivated parts of their range also, shorebirds search out and destroy many creatures that are detrimental to man's interest. Several species prey upon the predaceous diving beetles (*Dytiscidae*), which are a nuisance in fish hatcheries and which destroy many insects, the natural food of fishes. The birds now known to take these beetles are:

Northern phalarope (*Lobipes lobatus*).
Wilson phalarope (*Steganopus tricolor*).
Avocet (*Recurvirostra americana*).
Black-necked stilt (*Himantopus mexicanus*).
Jacksnipe (*Gallinago delicata*).
Dowitcher (*Macrorhamphus griseus*).
Robin snipe (*Tringa canutus*).
Pectoral sandpiper (*Pisobia maculata*).
Red-backed sandpiper (*Pelidna alpina sakhalina*).
Killdeer (*Oxyechus vociferus*).

Large numbers of marine worms of the genus *Nereis*, which prey upon oysters, are eaten by shorebirds. These worms are common on both the Atlantic and Gulf coasts and are eaten by shorebirds wherever they occur. It is not uncommon to find that from 100 to 250 of them have been eaten at one meal. The birds known to feed upon them are:

Northern phalarope (*Lobipes lobatus*).
Dowitcher (*Macrorhamphus griseus*).
Stilt sandpiper (*Micropalama himantopus*).
Robin snipe (*Tringa canutus*).
Purple sandpiper (*Arquatella maritima*).
White-rumped sandpiper (*Pisobia fusicollis*).
Red-backed sandpiper (*Pelidna alpina sakhalina*).
Killdeer (*Oxyechus vociferus*).

The economic record of the shorebirds deserves nothing but praise. These birds injure no crop, but on the contrary feed upon many of the worst enemies of agriculture. It is worth recalling that their diet includes such pests as the Rocky Mountain locust and other injurious grasshoppers, the army worm, cutworms, cabbage worms, cotton worm, cotton cutworm, boll weevil, clover leaf weevil, clover root curculio, rice weevil, corn bill-bugs, wireworms, corn leaf-beetles, cucumber beetles, white grubs, and such foes of stock as the Texas fever tick, horseflies, and mosquitoes. Their warfare on crayfishes must not be overlooked, nor must we forget the more personal debt of gratitude we owe them for preying upon mosquitoes. They are the most important bird enemies of these pests known to us.

Shorebirds have been hunted until only a remnant of their once vast numbers is left. Their limited powers of reproduction, coupled with the natural vicissitudes of the breeding period, make their increase slow, and peculiarly expose them to danger of extermination.

In the way of protection a beginning has been made, and a continuous close season until 1915 has been established for the following birds: The killdeer, in Massachusetts and Louisiana; the upland plover, in Massachusetts and Vermont; and

the piping plover in Massachusetts. But, considering the needs and value of these birds, this modicum of protection is small indeed.

The above-named species are not the only ones that should be exempt from persecution, for all the shorebirds of the United States are in great need of better protection. They should be protected, first, to save them from the danger of extermination, and,second, because of their economic importance. So great, indeed, is their economic value, that their retention on the game list and their destruction by sportsmn is a serious loss to agriculture.—(End of the circular.)

* * * *

The following appeared in the *Zoological Society Bulletin*, for January, 1909, from Richard Walter Tomalin, of Sydney, N. S. W.:

"In the subdistricts of Robertson and Kangaloon in the Illawarra district of New South Wales, what ten years ago was a waving mass of English cocksfoot and rye grass, which had been put in gradually as the dense vine scrub was felled and burnt off, is now a barren desert, and nine famihaving eaten out the grass by the roots. Plough- take up other lands. This is through the grubs ties have been compelled to leave the district and lies out of every ten which were renting proper- ing proved to be useless, as the grubs ate out the grass just the same. Whilst there recently I was informed that it took three years from the time the grubs were first seen until to-day, to accomplish this complete devastation; in other words, three years ago the grubs began work in the beautiful country of green mountains and runnings streams.

"The birds had all been ruthlessly shot and de-

stroyed in that district, and I was amazed at the absence of bird life. The two sub-districts I have mentioned have an area of about thirty square miles, and form a table-land about 1200 feet above sea level."

The same kind of common sense that teaches men to go in when it rains, and keep out of fiery furnaces, teaches us that as a business proposition it is to man's interest to protect the birds. Make them plentiful and keep them so. When we strike the birds, we hurt ourselves. The protection of our insect-eating and seed-eating birds is a cash proposition,—protect or pay.

Were I a farmer, no gun ever should be fired on my premises at any bird save the English sparrow and the three bad hawks. Any man who would kill my friend Bob White I would treat as an enemy. The man who would shoot and eat any of the song-birds, woodpeckers, or shorebirds that worked for me, I would surely molest.

Every farmer should post every foot of his lands, cultivated and not cultivated. The farmer who does not do so is his own enemy; and he needs a guardian.

At this stage of wild life extermination, it is impossible to make any bird-protection laws too strict, or too far-reaching. The remnant of our birds should be protected, with clubs and guns if necessary. All our shorebirds should be accorded a ten-year close season. Don't ask the gunners whether they will *agree* to it or not. *Of course they will not agree to it,—never!* But our duty is clear,—to go ahead and *do it.*

MAR 1 19

Supreme Court of the United States

OCTOBER TERM, 1919.

No. 609.

THE STATE OF MISSOURI,
Appellant,

vs.

RAY V. HOLLAND, United States Game Warden.

Appeal from the District Court of the United States for the Western District of Missouri.

BRIEF FOR THE STATE OF KANSAS, AMICUS CURIAE.

RICHARD J. HOPKINS,
SAMUEL W. MOORE,
of Counsel.

Press of J. H. Frame, Kansas City, Mo.

SUBJECT INDEX.

PAGE

Statement. 1

I. Every state possesses the absolute right to deal as it may see fit with property held by it either as proprietor or in its sovereign capacity as a representative of the people, and this right is paramount to the exercise by the national government of its legislative or treaty-making power. 9

(a) The constitutional limitation prohibiting a state without the consent of Congress from entering into any agreement or compact with any state or with a foreign power prohibits "the formation of any combination tending to the increase of political power in the states which may encroach upon or interfere with the just supremacy of the United States." It has no application to agreements or compacts which a state may make in the control and regulation of its own property or property rights. 13

(b) The treaty-making power conferred upon the President and Senate does not include the right to regulate and control the property and property rights of an individual state held by it in its *quasi*-sovereign capacity. 23

II. Congress' lack of legislative power to divest a state of its property right and control over the wild game within its borders cannot be supplied by making a treaty with Great Britain. 29

III. The treaty-making power of the national government is limited by other provisions of the Constitution, including the Tenth Amendment. It cannot, therefore, divest a state of its police power or take away its ownership or control of its wild game. . . . 37

VI. The courts have never upheld a treaty whose subject matter extended beyond the constitutional domain of Congressional legislation. 71

PAGE

V. The lower court held that an act of Congress undertaking to regulate the game birds of a state would be unconstitutional in the absence of a treaty. The treaty in this case does not, by its terms, purport to create a closed season between December 31st and March 10th. Its executory agreement to pass future legislation covering this period is not the supreme law of the land and cannot have the effect of giving validity to an unconstitutional act. 77

TABLE OF CASES.

	PAGE
Bondi v. MacKay, 89 Atl. 228	60
Brader v. James, 246 U. S. 88	74
Buffington v. Day, 11 Wallace 113	43
Compagnie Francaise de Navigation v. Board of Health, 51 La. Ann. 1 (s. c. 25 So. Rep. 591)	53-54
Cantini v. Tillman, 54 Fed. 969	51
Chinese Exclusion Case, 130 U. S. 581	33-71
Chirac v. Chirac, 2 Wheat. 259	72
Coyle v. Smith, 221 U. S. 559 (s. c. 31 Sup. Ct. Rep. 688)	49
38 Cyc. 966	27
Downes v. Bidwell, 182 U. S. 318 (s. c. 21 Sup. Ct. Rep. 770, 796)	62
Fairfax Devisee v. Hunter's Lessee, 7 Cranch. 603	72
Fong Yue Ting v. U. S., 149 U. S. 698, 713	71
Geer v. State, 161 U. S. 519	10-43
Geofroy v. Riggs, 133 U. S. 258	41-72
George v. Pierce, 148 N. Y. Supp. 230	59
Hammer v. Dagenhart, 247 U. S. 251 (38 Sup. Ct. Rep. 529)	45-74
Hauenstein v. Lynham, 100 U. S. 483	72
Head Money Cases, 112 U. S. 580	34
Heim v. McCall, 239 U. S. 175	50
Holmes v. Jennison, 14 Pet. 616	25-67
Horner v. United States, 143 U. S. 570	35
House v. Mayes, 219 U. S. 270 (s. c. 31 Sup. Ct. Rep. 234)	69
In re D'Adamo's Estate, 212 N. Y. 241	73
In re Lis' Estate, 139 N. W. Rep. 300	73
In re Servas' Estate, 146 Pac. Rep. 651	73
International Law Digest, Vol. II	38
Kansas v. Colorado, 206 U. S. 46	44
Leong Mow v. Board of Commissioners, 185 Fed. 223	52
License Cases, 5 How. 504, 611	66

Monongahela Navigation Co. v. United States, 148 U. S. 312. 39
McEvoy v. Wyman, 191 Mass. 276. 73
Passenger Cases, 7 How. 283. 67
Patsone v. Pennsylvania, 232 U. S. 138. 49
People of the State of New York v. Becker, 241 U. S. 556 (s. c. 36 Sup. Ct. Rep. 705). 57
People v. Hesterberg, 211 U. S. 31. 10
Pierce v. State, 13 N. H. 536. 46
Prout v. Starr, 188 U. S. 537. 40
Rocca v. Thompson, 223 U. S. 317. 73
State v. McCullough, 153 Pac. 557. 9
State v. Heger, 194 Mo. 707. 9
Stearns v. Minnesota, 179 U. S. 223, 21 Sup. Ct. Rep. 73. 16-25
Succession of Rabasse, 47 La. Ann. 1452. 73
Talley v. Burgess, 246 U. S. 104. 74
Truax v. Raich, 239 U. S. 33 (s. c. 36 S. C. R. 7). 50, 71-72
Tucker's Limitations on the Treaty-Making Power, p. 339. 68
Turner v. American Baptist Missionary Union, 5 McLean 344, 347. 79
United States v. Lee Yen Tai, 185 U. S. 213, 220. . . . 35
United States v. Rauscher, 119 U. S. 407. 34
United States v. Sandoval, 231 U. S. 28. 73
Virginia v. Tennessee, 148 U. S. 503. 20-25
Ward v. Race Horse, 163 U. S. 504. 47-49
Wharton v. Wise, 153 U. S. 155 (s. c. 38 L. Ed. 669). 19-25
Whitney v. Robertson, 124 U. S. 190, 194 (s. c. 31 L. Ed. 386, 388). 78
Wong Yung Quy, 6 Sawy. 442, 451. 53
Yamataya v. Fisher, 189 U. S. 86 (23 Sup. Ct. Rep. 611). 71

In the Supreme Court of the United States

October Term, 1919.

THE STATE OF MISSOURI, *Appellant,*

vs.

RAY P. HOLLAND, United States Game Warden.

No. 609.

BRIEF OF RICHARD J. HOPKINS, ATTORNEY GENERAL, AND SAMUEL W. MOORE, AMICI CURIAE, AND IN BEHALF OF THE STATE OF KANSAS.

STATEMENT.

Counsel for the State of Kansas, by permission of the court, file this brief in support of the appeal taken by the State of Missouri from the decree of the District Court dismissing its bill brought to restrain the federal game warden from enforcing the Migratory Bird Treaty Act of July 3, 1918, and the regulations of the Secretary of Agriculture made thereunder.

The State of Kansas is interested in the result of this litigation in like manner and to the same extent as the State of Missouri. It has now pending in the United States District Court for the District of Kansas its bill in equity similar to the bill brought by its sister state, the general purpose of which is to establish the right, which it has always enjoyed, to control and regulate the taking of migratory game birds within its borders.

The legislature of Kansas has declared in express terms that the wild game within its borders is the property of the state, saying:

> The ownership of and title to all wild animals, birds and fishes, both resident and migratory, in the state, not held by private ownership legally acquired, shall be and are hereby declared to be in the state. (Sec. 4932, Ch. 44, General Statutes of Kansas, 1915.)

The legislature has also undertaken to control and regulate the taking of wild game and has created an open season for wild geese, wild brant and wild ducks, from September 1st to April 15th of each year (Sec. 4936, Ch. 44, General Statutes of Kansas, 1915).

The number of birds that may be taken in any one day is prescribed in Section 4936.

The legislature of Missouri has also declared in express terms that the ownership and title to all birds, fish and game is in the state, saying:

> The ownership and title to all birds, fish and game, whether resident, migratory or imported, in the State of Missouri, not now held by private ownership legally acquired, is hereby declared to be in the State. (Sec. 6508, Rev. Stat. Mo. 1909.)

The legislature has also undertaken in subsequent sections to control and regulate the hunting of wild game and has created an open season (Sec. 6516) from January 1st to April 30th, and from September 15th to December 31st of each year.

It is apparent, therefore, that there is a sharp conflict between the statutes of the States of Kansas and Missouri on the one hand and the regulations of the Secretary of Agriculture on the other hand. The state statutes permit spring shooting; the regulations entirely forbid it. The regulations permit the taking of twenty-five wild ducks in any one day during the open season which it prescribes. By the laws of Missouri, the limit is fifteen in any one day. In Kansas the limit is twenty in one day.

It is apparently assumed by the lower court, in its opinion, that the wild ducks and geese which cross the states of Missouri and Kansas during their migrations, have their breeding places in Canada, and this assumption is made use of in support of the treaty between the United States and Great Britain. We desire to point out, however, that the most reliable information upon the subject indicates that their breeding places are within the United States, and that in their migrations they do not pass beyond its boundaries into Canada. The United States Department of Agriculture in 1906 published Bulletin No. 26 of the Biological Survey, entitled "Distribution and Migration of North American Ducks, Geese and Swans." The bulletin was transmitted to the Secretary of Agriculture for the purpose of "furnishing information as to present range, abundance and migration of the several species (of ducks, geese and swans) with reference to practical legislation." Copies of this publication are lodged with the clerk. At page 10 appears a statement

to the effect that the species of duck and geese with which the laws of Missouri and Kansas are concerned have their breeding places in the United States, as follows:

> The problem of the legal protection of ducks, geese and swans has two phases—protection during the breeding season and protection during migration and in winter. The first phase concerns 24 species of ducks breeding in the United States, while 46 species come under the head of winter residents of the United States. It happens, however, that from the economic point of view, the 24 species of ducks and geese that breed in the United States comprise the most important North American species; among this number, also, are all the species that at the present time need protection while breeding. Of the 24 species, five are numerically unimportant and are confined to the southern portions of the United States and southward, so that they are of little importance for the market and as objects of sport. These five are the Florida duck, mottled duck, masked duck, black-bellied tree-duck and fulvous tree-duck.
>
> The other 19 species *that breed regularly and commonly in the United States* are as follows:
>
> American merganser, *Merganser americanus.*
> Hooded merganser, *Lophodytes cucullatus.*
> Mallard, *Anas Boschas.*
> Black duck, *Anas obscura.*
> Gadwall, *Chaulelasmus streperus.*
> Baldpate, *Mareca americana.*
> Green-winged teal, *Nettion carolinense.*
> Blue-winged teal, *Querquedula discors.*
> Cinnamon teal, *Querquedula cyanoptera.*
> Shoveler, *Spatula clypeata.*
> Pintail, *Dafila acuta.*
> Wood duck, *Aix sponsa.*
> Redhead, *Aythya americana.*
> Canvasback, *Aythya vallisneria.*
> Lesser scaup, *Aythya affinis.*

Ring-neck duck, *Aythya collaris.*
Ruddy neck, *Erismatura jamaicensis.*
Canada goose, *Branta canadensis.*
White-cheeked goose, *Branta canadensis occidentalis.*

A glance shows that this list comprises the species that in later years have decreased most in numbers, and hence that most need protection.

It thus appears upon the authority of the Department of Agriculture that the wild duck and geese with which we are concerned in this hearing, while migratory in their habits, limit their migrations to the United States and have neither breeding places nor feeding grounds in Canada. It should be noted that while in the treaty it is recited that "many species of birds, in the course of their annual migrations, traverse certain parts of the United States and the Dominion of Canada," yet it is nowhere stated, either in the treaty or in the act that the species of ducks and geese with which we are concerned, pass into or out of Canada during their migrations.

Attention is called to the fact that the Migratory Bird Treaty Act is broader in its scope than the treaty itself. Paragraph 2 of the treaty provides:

> The closed season on migratory game birds shall be between March 10th and September 1st.

Then follows an *executory agreement* of the contracting parties for further legislation, as follows:

> The season for hunting shall be further restricted to such period not exceeding three and one-half months as the High Contracting Powers may severally deem appropriate and define by law or regulation.
>
> The High Contracting Powers agree themselves to take, or propose to their respective appropriate law-

making bodies, the necessary measures for insuring the execution of the present convention.

The regulations made by the Secretary of Agriculture prohibit the hunting of migratory birds in Kansas and Missouri except from September 16th to December 31st. If the treaty be given the effect of a law, it prohibits spring shooting *only after March 10th.* A closed season between January 1st and March 10th is created by the regulations of the Secretary of Agriculture, but *not* by the treaty itself.

The bill of complaint is based upon the alleged invalidity of the Migratory Bird Treaty Act of March 3, 1918, and regulations of the Secretary of Agriculture made thereunder. No question is made in the bill of the validity or invalidity of the Migratory Bird Treaty between this country and Great Britain, although that question is made the controlling one in the opinion of the lower court. It was there held in substance that an act of Congress standing by itself and without the aid of a prior treaty is unconstitutional and void in so far as it undertakes to control or regulate the hunting of wild game within a state, for the reason that the subject matter pertains to the police power of the state and is within the latter's exclusive control. But the court also held that where an act of Congress is preceded by a treaty with Great Britain undertaking to regulate the subject of migratory birds, the domain of national legislative power is broadened by the treaty so that it may operate upon and control matters of police within a state, and supersede the state's control thereof.

It is our contention that the legislative power of Congress is limited and defined by the Constitution and that it can neither be narrowed nor broadened by any treaty,

regardless of what may be its subject matter, and that an act of Congress which is powerless to invade the police power of the state is equally powerless to do so after a treaty has been made with a foreign country touching the same subject matter. A discussion of this exceedingly important question involves a consideration of various provisions of the Constitution of the United States, as follows:

> All legislative powers herein granted shall be vested in the Congress of the United States, which shall consist of a Senate and House of Representatives. Sec. 1, Art. I.
>
> No state shall enter into any treaty, alliance or confederation. Article I, Section 10, Clause 1.
>
> No state shall, without the consent of Congress, enter into any agreement or compact with any state, or with a foreign power. Article I, Section 10, Clause 2.
>
> He (the President) shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the senators present concur. Article II, Section 2, Clause 2.
>
> This constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding. Article VI, Clause 2.
>
> The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people. (Tenth Amendment.)

Do these constitutional provisions, or any of them, invest the national Government with power and authority,

to be exercised by Congress or by the President and Senate in the form of a treaty, to regulate the open and closed hunting seasons of game birds in the states of Missouri and Kansas? Can the police power of the states of Missouri and Kansas be thus controlled by the Federal Government? Can the legislative power of the national Government conferred upon it by the Constitution be added to or broadened by the execution of a treaty with a foreign nation, so as to give to it the right to control the police power of the state, which without the treaty it confessedly could not do? What is the effect of the Tenth Amendment to the Constitution of the United States reserving to each state the exercise of its police power?

BRIEF.

I.

Every state possesses the absolute right to deal as it may see fit with property held by it, either as proprietor or in its sovereign capacity as a representative of the people, and this right is paramount to the exercise by the national Government of its legislative or treaty-making power.

Missouri and Kansas, as above stated, have each declared through its legislature in the most emphatic manner, that the wild game within its borders is its own property to deal with as it may see fit, for the common benefit of its citizens.

The Supreme Court of Missouri (*State* v. *Heger*, 194 Mo. 707) has held that the absolute ownership of wild game is vested in the people of the State, and that the exclusive right to prescribe open and closed seasons is vested in the State legislature, as appears from the first syllabus:

> The absolute ownership of wild game is vested in the people of the state, and the legislature, as the representative of the people, may grant to individuals the right to hunt and kill game at such times and upon such terms and under such restrictions, as it may see proper, or prohibit it altogether, as the legislature may deem best. The regulation of such a matter falls within the police power of the state.

The Supreme Court of Kansas reached the same conclusion in *State* v. *McCullough*, 158 Pac. 557, where it is said:

> Congress has no power to prescribe regulations for the protection of migratory game birds while within the boundaries of a state.

The many cases cited in the brief of the State of Missouri are unanimous in upholding the right of a state to regulate the hunting and taking of game birds within its borders for the common benefit of the people of the state. It is a proper exercise of the power legitimately belonging to each state.

This court in *Geer* v. *State*, 161 U. S. 519, said:

> The right to preserve game flows from the undoubted existence in the state of a *police power* to that end.

In *People* v. *Hesterberg*, 211 U. S. 31, a statute of the state of New York was upheld making it a penal offense to have possession of game out of season. The court said:

> In the case of *Geer* v. *Connecticut*, 161 U. S. 519, 40 L. Ed. 793, 16 Sup. Ct. Rep. 600, the plaintiff in error was convicted for having in his possession game birds killed within the state, with the intent to procure transportation of the same beyond the state limits. It was contended that this statute was a direct attempt by the state to regulate commerce between the states. *It was held that the game of the state was peculiarly subject to the power of the state, which might control its ownership for the common benefit of the people*, and that it was within the power of the state to prohibit the transportation of game killed within its limits beyond the state, such authority being embraced in the right of the state to confine the use of such game to the people of the state. After a discussion of the peculiar nature of such property, and the power of the state over it, Mr. Justice White, who delivered the opinion of the court in that case, said:

"Aside from the authority of the state, derived from the common ownership of game and the trust for the benefit of its people which the state exercises in relation thereto, there is another view of the power of the state in regard to the property in game, which is equally conclusive. *The right to preserve game flows from the undoubted existence in the state of a police power to that end,* which may be none the less efficiently called into play because by doing so interstate commerce may be remotely and indirectly affected. *Kidd* v. *Pearson*, 128 U. S. 1, 32 L. Ed. 346, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6; *Hall* v. *De Cuir*, 95 U. S. 485, 24 L. Ed. 547; *Sherlock* v. *Alling*, 93 U. S. 99, 103, 23 L. Ed. 819, 820; *Gibbons* v. *Ogden*, 9 Wheat. 1, 6 L. Ed. 23. Indeed, the source of the police power as to game birds (like those covered by the statute here called in question) *flows from the duty of the state to preserve for its people a valuable food supply. Phelps* v. *Racey*, 60 N. Y., 19 Am. Rep. 140; *Ex parte Maier and Magner* v. *People, ubi supra*, and the cases there cited. The exercise by the state of such power therefore comes directly within the principle of *Plumley* v. *Massachusetts*, 155 U. S. 461, 473, 39 L. Ed. 223, 227, 5 Inters. Com. Rep. 590, 15 Sup. Ct. Rep. 154. The power of a state to protect, by adequate police regulation, its people against the adulteration of articles of food (which was, in that case, maintained), although, in doing so, commerce might be remotely affected, necessarily carries with it the existence of a like power to preserve a food supply *which belongs in common to all the people of the state*, which can only become the subject of ownership in a qualified way, and which can never be the object of commerce except with the consent of the state, and subject to the conditions which it may deem best to impose for the public good."

It is held by the lower court in this case that the right to regulate the taking and hunting of game birds is a part of the police power of the state, and so beyond the control of

the Federal government *in the absence of a treaty*. It is said (Rec. 8):

> Primarily, the state, both as trustee for the rights of all its people and in the exercise of its police power, has control over the right to reduce animals *ferae naturae* to possession.
>
> *Manchester* v. *Mass.*, 139 U. S. 240.
> The Abby Dodge, 223 U. S. 166-174.
> *Geer* v. *Conn.*, 161 U. S. 519-522-528.
> *Ward* v. *Race Horse*, 163 U. S. 504.
> *Patsone* v. *Penn.*, 232 U. S. 138.
> *United States* v. *McCullagh*, 221 Fed. 288.
> *United States* v. *Shauver*, 214 Fed. 154.
> *Silz* v. *Hesterberg*, 211 U. S. 31.
> *Kennedy* v. *Becker*, 241 U. S. 556.
> *State* v. *Rodman*, 56 Minn. 393.
> *Smith* v. *Maryland*, 18 How. 71-75.
> *Lawton* v. *Steele*, 152 U. S. 133.
> *Carey* v. *South Dakota*, 250 U. S. 118.
>
> And in the absence of treaty there appears to have been no delegation of paramount authority to the Federal Government. Under the foregoing authorities, therefore, as well as on principle, this Act, in the absence of treaty, would be unconstitutional as exceeding the legitimate powers of Congress; and so it has been in cases substantially identical.
>
> *United States* v. *Shauver*, 214 Fed. 154.
> *United States* v. *McCullagh*, 221 Fed. 288.

It is said by the lower court, in substance, that Congress in the exercise of all the powers delegated to it by the Constitution cannot lawfully prescribe the open and closed seasons for the hunting of game birds in Missouri and Kansas, but that when a treaty has been made, its legislative powers are broadened and given an added potency and vigor so that they may be exercised upon subjects otherwise within the exclusive police power

of those states. A treaty, it is said, possesses the extraordinary power of breathing the breath of life into an act of Congress which otherwise would be unconstitutional and void.

We respectfully submit that these conclusions involve a misconception and misconstruction of the provisions of the Constitution; that the treaty-making power is limited in its operation and must act in subordination to other provisions of the Constitution, including the Tenth Amendment; that it may not invade or control the police power reserved to the several states; that the control and regulation by a state of the wild life within its borders is not a proper subject of the treaty-making power, but on the contrary is a part of the police power of the state; that the legislative power of Congress cannot be increased by the mere making of a treaty with a foreign nation; that a treaty, in order to be "the supreme law of the land" must be made "under the authority of the United States," which means that it must be made in the exercise of the powers delegated to the United States by the Constitution.

(a) The constitutional limtation prohibiting a state without the consent of Congress from entering into any agreement or compact with any state or with a foreign power, prohibits "the formation of any combination tending to the increase of political power in the states which may encroach upon or interfere with the just supremacy of the United States." It has no application to agreements or compacts which a state may make in the control and regulation of its own property or property rights.

Our contention is that a state in the exercise of its police power possesses the exclusive power to regulate the

hunting and taking of game birds within its borders, and to make contracts with other states or foreign powers, if necessary for that purpose, and that this right has never been delegated to the Federal Government; that it is not included within the subject-matter of the constitutional limitation prohibiting a state from making a compact or agreement with another state or with a foreign power without the consent of Congress; that it is not embraced within the constitutional limitation forbidding any state to enter into any treaty, alliance or confederation, and that it is not a proper subject of a treaty which, under the Constitution, the President may make with the advice and consent of the Senate.

First, as to constitutional provision:

> No state shall, without the consent of Congress, enter into any agreement or compact with any state or with a foreign power.

Does this constitutional limitation prohibit a state from entering into an agreement or compact with another state or with a foreign power, concerning the regulation and control of migratory game birds? If so, then it may be plausibly argued that the framers of the Constitution intended to take from the individual states their power over this subject-matter and transfer to the national Government. If not, then it may be argued with great force that the framers of the Constitution intended that each state should retain its police power in this respect and should be permitted to exercise it free from any Federal restraint imposed.

We are able to say, upon the authority of this court, that the purpose of the constitutional limitation above re-

ferred to was not to interfere with the right of each individual state to control and regulate its own property, whether held by it as a proprietor or in trust for the common benefit of the people of the state. Its purpose was to preserve the just and proper relation of each state to every other state as well as to the national Government. No state should be permitted by agreement or compact with a foreign power, to secure to itself any political or material advantage not shared by the other states, nor should any state be permitted to increase its political power over that of some other state, nor should it be permitted to encroach upon or interfere with the just supremacy of the United States. The consent of the United States is required only for the purpose of enabling it to preserve its own supremacy and to prevent any encroachment upon it by the states, as well as to prevent the political or commercial aggrandizement of one state at the expense of another, by refusing its consent where such appears to be the purpose or effect of any agreement or compact made by one state with another or with a foreign power. The country's unhappy experience under the Articles of Confederation had taught it the stern necessity of this provision.

There was no thought in the minds of the framers of the Constitution of prohibiting agreements or compacts between states or with a foreign power or requiring the assent of Congress thereto, when the subject matter could in no respect concern the United States, such as compacts or agreements concerning the administration of a state's own property. Indeed, it has been ruled by this court that this constitutional inhibition does not prevent states, among other things, from making agreements between themselves, without securing the consent of Congress, with

respect to their boundaries, to the management of their own property, with respect to the prevention of disease, and for the mutual comfort and convenience of states bordering on each other. Doubtless the same rule would apply with respect to compacts and agreements between states and a foreign power. The purpose of this constitutional provision and its limitations are clearly set forth in *Stearns* v. *Minnesota,* 179 U. S. 223, 21 Sup. Ct. Rep. 73, where the court says:

> Section 10 of Article 1 of the Constitution provides that "no state shall, without the consent of Congress, * * * enter into any agreement or compact with another state." It was early ruled that these negative words carried with them no denial of the power of two states to enter into a compact or agreement, with one another, but only placed a condition upon the exercise of such power. Thus in *Green* v. *Biddle,* 8 Wheat. 1, 5 L. Ed. 547, a compact between Virginia and Kentucky was sustained, and it was held no valid objection to it that within certain restrictions it limited the legislative power of the state of Kentucky. In *Poole* v. *Fleeger,* 11 Pet. 185, 9 L. Ed. 680, 955, an agreement between Kentucky and Tennessee as to boundary was upheld, Mr. Justice Story, speaking for the court, saying (p. 209, L. Ed., p. 690):
>
> "It cannot be doubted that it is a part of the general right of sovereignty, belonging to independent nations, to establish and fix the disputed boundaries between their respective territories; and the boundaries so established and fixed by compact between nations become conclusive upon all the subjects and citizens thereof, and bind their rights; and are to be treated, to all intents and purposes, as the true and real boundaries. This is a doctrine universally recognized in the law and practice of nations. It is a right equally belonging to the states of this Union, unless it has been surrendered under the Constitution of the United States. So far

from there being any pretense of such a general surrender of the right, that it is expressly recognized by the Constitution, and guarded in its exercise by a single limitation or restriction, requiring the consent of Congress. The Constitution declares that no state shall, without the consent of Congress, enter into any agreement or compact with another state, thus plainly admitting that with such consent it might be done, and in the present instance that consent has been expressly given. The compact, then, has full validity, and all the terms and conditions of it must be equally obligatory upon the citizens of both states."

The same doctrine was announced in *Virginia* v. *Tennessee*, 148 U. S. 503, 37 L. Ed. 531, 13 Sup. Ct. Rep. 728, and in the opinion in that case it was intimated that *there were many matters in respect to which the different states might agree without the formal consent of Congress.* In this case the difference between the agreement which states might enter into between one another and those from which they were debarred without the consent of Congress was noticed, and it was said (p. 518, L. Ed., p. 542 13 Sup. Ct. Rep., p. 734):

"*There are many matters upon which different states may agree that can in no respect concern the United States.* If, for instance, Virginia should come into possession and ownership of a small parcel of land in New York which the latter state might desire to acquire as a site for a public building, it would hardly be deemed essential for the latter state to obtain the consent of Congress before it could make a valid agreement with Virginia for the purchase of the land. If Massachusetts in forwarding its exhibits to the World's Fair at Chicago, should desire to transport them a part of the distance over the Erie Canal, it would hardly be deemed essential for that state to obtain the consent of Congress before it could contract with New York for the transportation of the exhibits through that state in that way. If the bordering line of two states should

cross some malarious and disease-producing district, there could be no possible reason, on any conceivable public grounds, to obtain the consent of Congress for the bordering states to agree to unite in draining the district, and thus remove the cause of disease. So in case of threatened invasion of cholera, plague or other causes of sickness and death, it would be the height of absurdity to hold that the threatened states could not unite in providing means to prevent and repel the invasion of the pestilence without obtaining the consent of Congress, which might not be at the time in session If, then, the terms 'compact' or 'agreement' in the Constitution do not apply to every possible compact or agreement between one state and another, for the validity of which the consent of Congress must be obtained, to what compacts or agreements does the Constitution apply?

"Looking at the clause in which the terms 'compact' or 'agreement' appear, it is evident that the prohibition is directed to the formation of *any combination tending to the increase of political power in the states, which may encroach upon or interfere with the just supremacy of the United States.* Story, in his Commentaries (Sec. 1403), referring to a previous part of the same section of the Constitution in which the cause in question appears, observes that its language "may be more plausibly interpreted from the terms used, 'treaty, alliance or confederation,' and upon the ground that the sense of each is best known by its association (*noscitur a sociis*) to apply to *treaties of a political character;* such as *treaties of alliance for purposes of peace and war;* and *treaties of confederation, in which the parties are leagued for mutual government, political co-operation and the exercise of political sovereignty,* and *treaties of cession of sovereignty,* or *conferring internal political jurisdiction,* or *external political dependence,* or *general commercial privileges';* and that 'the latter clause, "compacts and agreements," might then very properly apply to such as regarded

> what might be deemed mere *private rights of sovereignty;* such as questions of *boundary,* interests in *land* situate in the territory of each other, and other *internal regulations for the mutual comfort and convenience of states bordering on each other.*" And he adds: "In such cases the consent of Congress may be properly required, *in order to check any infringement of the rights of the national government;* and, at the same time, a total prohibition to enter into any compact or agreement might be attended with permanent inconvenience or public mischief."

The constitutional provision in question was never designed to prevent arrangements between the states in the exercise of their *private rights of sovereignty,* to facilitate the free intercourse of their citizens or to remove barriers to their peace and prosperity. For this purpose the consent of Congress is not necessary. The states have full authority, *without congressional sanction,* to make agreements among themselves regulating the rights of *fishing* in the waters adjacent to both. This is decided in *Wharton* v. *Wise,* 153 U. S. 155 (s. c. 38 L. Ed. 669). There a compact had been entered into in 1785 between Maryland and Virginia, duly ratified by the legislature of each state, which, among other things, governed the right of fishing in certain rivers between the two states, the seventh and eighth clauses being as follows:

> The seventh clause provided that "the citizens of each state, respectively, shall have full property in the shores of Potowmack river adjoining their lands, with all emoluments and advantages thereunto belonging, and the privilege of making and carrying out wharves and other improvements, so as not to obstruct or injure the navigation of the river; *but the right of fishing in the river shall be common to and equally enjoyed by the citizens of both states; provided, that such common*

right be not exercised by the citizens of the one state to the hindrance or disturbance of the fisheries on the shores of the other state; and that the citizens of neither state shall have a right to fish with nets or seines on the shores of the other."

The eighth clause provided that "all laws and regulations which may be necessary for the *preservation of fish*, or for the performance of quarantine in the river Potowmack, or for preserving and keeping open the channel and navigation thereof, or of the river Pocomoke, within the limits of Virginia, by preventing the throwing out ballast or giving any other obstruction thereto, shall be made *with the mutual consent and approbation of both states."*

It was held by the court that the compact was one which it was lawful for the states to make under the Articles of Confederation, the court quoting and relying upon the reasoning of *Virginia* v. *Tennessee*, 148 U. S. 503. The court said:

> The validity of the compact of 1785 has been questioned as in conflict with the second clause of the sixth article of the Confederation, which provided that no two or more states should enter into any treaty, confederation or alliance whatever between them without the consent of the United States in Congress assembled, specifying accurately the purposes for which the same was to be entered into, and how long it should continue; and also as having been superseded by the Constitution of the United States subsequently adopted. A few words upon each of these positions. The articles inhibiting any treaty, confederation or alliance between the states without the consent of Congress *were intended to prevent any union of two or more states, having a tendency to break up or weaken the league between the whole; they were not designed to prevent arrangements between adjoining states to facilitate the free intercourse of their citizens, or remove barriers to their*

peace and prosperity; and whatever their effect, such arrangements could not be subject of complaint by the states making them until, at least, the Congress of the Confederation interposed objections to their adoption or enforcement, which was never done.

In determining the effect of the prohibition of the clause in the sixth article of the Confederation upon the validity of the compact, the observations of this court, in the recent decision of the controversy between Virginia and Tennessee, upon the meaning of the clause of the Constitution of the United States which is similar, in one particular, with that in the Articles of Confederation, and broader in another, may be properly considered. The article of the Confederation inhibits "any treaty, confederation or alliance" between two or more states without the consent of Congress. The Constitution of the United States prohibits, without such consent, any "agreement or compact" of one state with another. In the case mentioned there was an agreement between the states of Virginia and Tennessee to appoint commissioners to run and mark the boundary between them, made without the consent of Congress, and the question considered was whether the agreement was within the prohibition of the clause cited from the Constitution of the United States, and we said:

(Quotation from *Virginia* v. *Tennessee, supra.*)

So, in the present case, looking at the object evidently intended by the prohibition of the Articles of Confederation, *we are clear they were not directed against agreements of the character expressed by the compact under consideration. Its execution could in no respect encroach upon or weaken the general authority of Congress under those articles.*

In the light of these decisions, it is clear that the states were left entirely free to manage and administer their own

properties and property interests. There was no intention to place any restraint whatsoever upon their action in that respect. They were free to contract with other states or with a foreign power. The consent of Congress was not required.

The states of Missouri and Kansas have each made regulations for the hunting and taking of migratory birds, which in its judgment are best calculated to protect the interests of its citizens. No further regulations appear to them as necessary or desirable. If, however, in the future, some agreement with Canada or a neighboring state should become necessary for their mutual benefit or protection, they possess ample power to make such compacts or agreements as may be mutually advantageous. Such mutual arrangements would not affect the just and proper relation of the states to each other nor would it encroach upon the sovereignty of the United States. There would be no necessity for securing the consent of Congress.

The outstanding feature of this branch of the case, however, is that in adopting the Constitution the people reserved to themselves the power of business administration, regulation and control of the properties of the several states, whether owned by them as proprietors or held in trust for the benefit of the people. This reservation is at once manifest from the fact that the power just referred to is excluded from the powers delegated to the federal government to prohibit altogether compacts and agreements between states or with foreign powers, or to prohibit all such compacts and agreements as did not receive the express assent of Congress. *A fortiori*, this reserved power did not pass to the general government so as to constitute a proper subject-matter of a treaty with a foreign nation.

(b) The treaty-making power conferred upon the President and Senate does not include the right to regulate and control the property and property rights of an individual state held by it in its quasi-sovereign capacity.

It is clearly established, we respectfully submit, that the constitutional limitation forbidding a state, without the consent of Congress, from entering into any agreement or compact with any state or with a foreign power, does not prevent a state from entering into such contracts concerning the control and administration of its property either held in fee or in trust for its people. This rule applies to its absolute ownership of fixed property, such as the capitol building and grounds, state university and other institutions, and it likewise applies with equal force to its qualified ownership in the wild life within the state.

It remains to consider, therefore, whether the constitutional power conferred upon the President to make treaties by and with the advice and consent of the Senate includes the power to control and regulate the property or property rights of an individual state. In other words, is the property right which an individual state possesses in the wild life within its borders a proper subject-matter of a treaty between the United States and a foreign country? We feel this question should be answered in the negative, and proceed to state our reasons.

It is certain that treaties made by the national government are necessarily and essentially different from the "agreements or compacts" which a state may make with another state or with a foreign power, with or without the consent of Congress, as the case may be.

This must be so, because the framers of the Constitution have themselves made the distinction when they provided in one clause of Section 10 of Article I "that no state shall

enter into any treaty, alliance, or confederation," and in another clause of the same section have provided that "no state, without the consent of Congress, shall enter into any agreement or compact with any state or with a foreign power," and then in another section have conferred upon the President the power, with the concurrence of the Senate, to make "treaties." It is impossible to suppose that there is not a clear line of demarkation between an "agreement or compact" on the one hand and a "treaty" on the other. In this greatest document of all history every sentence and every word was used with great accuracy and after the most momentous deliberation. No part of it may be ignored.

It is certain that the expression "any agreement or compact" deals with contracts which a state may desire to make in its own interest. It is the state as a unit, and not the nation, whose rights are sought to be protected.

But a treaty made by the national government with a foreign nation, in the exercise of its treaty-making power, must be something more than a "compact or agreement" affecting an individual state in its relation to another state or to a foreign country. A treaty is a contract involving an exertion of national authority within the enumerated powers of the Constitution, in which the relation of the federal government, as a unit, to some foreign nation is the subject-matter. A treaty involves international relations of a political character, an alliance for purposes of peace or war, a confederation of nations in which the parties are leagued for mutual government, political cooperation and the exercise of political sovereignty. It may involve a cession of sovereignty, the conferring of internal political jurisdiction or external political dependence or general commercial privileges. This is the view taken by

Judge Story in his Commentaries, Sec. 1403, quoted with approval by this Court in *Stearns* v. *Minn.*, 179 U. S. 223; *Wharton* v. *Wise*, 153 U. S. 155, and *Virginia* v. *Tennessee*, 148 U. S. 503. The author says that the treaty-making power of the national government concerns:

> Treaties of a political character; such as treaties of alliance for purposes of peace and war, and treaties of confederation, in which the parties are leagued for mutual government, political co-operation, and the exercise of political sovereignty, and treaties of cessation of sovereignty, or conferring internal political jurisdiction, or external political dependence, or general commercial privileges.

These observations, it is submitted, find support in the opinion of Chief Justice Taney, with whom concurred Justices Story, McLean and Wayne, in *Holmes* v. *Jennison*, 14 Peters 540, where the state of Vermont had undertaken to deliver to Canada a fugitive from justice. The Supreme Court was evenly divided upon the question of jurisdiction, and hence the judgment appealed from was affirmed, but the following represents the judgment of the four justices named, without dissent on the part of their associates, as to the subject-matter upon which the national power to make treaties may properly operate:

> The power to make treaties is given by the Constitution in general terms, without any description of the objects intended to be embraced by it; and, consequently, it was designed to include all those subjects, which in the ordinary intercourse of nations had usually been made subjects of negotiation and treaty, and which are *consistent with the nature of our institutions*, and *the distribution of powers between the general and state governments*. And without attempting to define the exact limits of this treaty-making

power, or to enumerate the subjects intended to be included in it, it may safely be assumed that *the recognition and enforcement of the principles of public law, being one of the ordinary subjects of treaties, were necessarily included in the power conferred on the general government.* And, as the rights and duties of nations towards one another, in relation to fugitives from justice, are a part of the law of nations, and have always been treated as such by the writers upon public law, it follows that the treaty-making power must have authority to decide how far the right of a foreign nation in this respect will be recognized and enforced when it demands the surrender of anyone charged with offenses against it. * * * Indeed, the whole frame of the Constitution supports this construction. All the powers which relate to *our foreign intercourse* are confided to the general government. Congress have the power to *regulate commerce;* to define and *punish piracies and felonies* committed on the high seas; and *offenses against the laws of nations;* to *declare war;* to *grant letters of marque and reprisal;* to *raise and support armies;* to *provide and maintain a navy.* And the President is not only authorized, by and with the advice and consent of the Senate, to make treaties, but he also nominates and, by and with the advice and consent of the Senate, appoints ambassadors and other public ministers, through whose agency negotiations are to be made and treaties concluded. He also receives the ambassadors sent from foreign countries; and *everything that concerns our foreign relations, that may be used to preserve peace or to wage war, has been committed to the hands of the federal government.* The power of deciding whether a fugitive from a foreign nation should or should not be surrendered was, necessarily, a part of the powers thus granted.

The subject-matter of treaties is thus defined in 38 Cyc. 966:

> Generally speaking the treaty-making power extends to all proper subjects of negotiations between the governments of different nations. As expressed in the Constitution of the United States the treaty-making power is in terms unlimited, and subject only to those restraints which are found in that instrument against the action of the government or its departments and those arising from the nature of the government itself and of that of the states. To what extent it is thus limited has been considerably discussed without being definitely defined, no treaty having ever been declared by the courts to be void. It would seem clear, however, that the treaty power does not extend so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the states, and it has also been stated that it would not authorize a cession of any portion of the territory of a state without the consent of that state; but subject to the limitations mentioned it may be said generally to extend to all matters which are proper subjects of negotiation between our government and the governments of other nations, such as matters relating to extradition, property rights and disabilities of aliens, rights, powers and duties of ambassadors and consuls, and the jurisdiction of consular courts, regulation of commercial relations with foreign countries, regulation and protection of trade-marks, submission to arbitration of controversies with other governments in which public interests are concerned, and the acquisition of territory.

The subject of the treaties made between the United States and foreign nations referred to in the foregoing quotation has in each instance been within the scope of the powers delegated to the national government by the express terms of the Constitution. In no instance has there been

any invasion of the police power of an individual state. The fact should not be overlooked that while the game birds in question are migratory, yet their migrations are limited to the United States. Their periodical journeys do not take them into Canada, according to the Biological Survey Bulletin No. 26 published by the United States Department of Agriculture, quoted in our statement. Of what concern is it therefore to Great Britain? What justification is there for any treaty with a foreign nation?

The regulation of migratory birds is not properly within the treaty-making power. It was never intended that the property rights of an individual state should be the subject-matter of contract with a foreign power. It was never intended that Great Britain should ever participate in the determination of the open and closed seasons for the hunting of game birds in the states of Missouri and Kansas, so as to invalidate the regulations which those states themselves have made in that behalf. If the President of the United States by contract with a foreign nation with the assent of the Senate may regulate and control the property of the states of Missouri or Kansas, in respect to migratory birds, there is no reason why the same authority may not assume to regulate all other property of those states. If this right exists, then a treaty with a foreign country may take jurisdiction of a state capitol, state university, and many other state institutions, and regulate them to the exclusion of the states themselves.

Why may not the subject of marriage and divorce be regulated by a treaty which would result in one uniform law throughout the United States, and thus the evils arising from conflicting state laws be removed? Certain of the states have laws concerning the organization of corporations and the conduct of their affairs which are regarded by many thoughtful persons as entirely too lax. A treaty

with some foreign country upon the subject of the organization and control of corporations would, if valid, result in uniformity of laws throughout our country, remove the inequality of conditions in the different states, and put all corporations upon an equal footing. A treaty with foreign countries might prescribe uniformity in the laying out and beautification of parks, the construction of boulevards, and the general planning of our cities, as well as the construction and maintenance of our highways in the country. Child labor laws could thus be made uniform throughout the states and uniform rules laid down covering the conditions of labor, including wages in stores, factories and mines.

Migratory game birds, which, as it has been held repeatedly, are the absolute property of the people of the several states, sustain no more intimate relation to treaties of alliance for purposes of peace and war, for political cooperation, or for the exercise of political sovereignty, than do the matters of internal police just enumerated. They are all in the same class and constitute a part of the internal police of each state. The national government has no control over them.

II.

Congress' lack of legislative power to divest a state of its property right and control over the wild game within its borders cannot be supplied by making a treaty with Great Britain.

The lower court held that in the absence of a treaty, the federal government had no paramount authority to regulate the taking of game birds within the boundaries of the state. It said:

> And in the absence of treaty there appears to have been no delegation of paramount authority to the fed-

> eral government. Under the foregoing authorities, therefore, as well as on principle, this Act, in the absence of treaty, would be unconstitutional as exceeding the legitimate powers of Congress; and so it has been held in cases substantially identical.
>
> *United States* v. *Shauver*, 214 Fed. 154.
> *United States* v. *McCullagh*, 221 Fed. 288.

But the lower court sustained the Migratory Bird Treaty Act as constitutional, upon the sole ground that the making of the treaty with Great Britain in 1916 had so added to and broadened the legislative powers of Congress that its Act with the treaty back of it was valid, where its Act without the treaty would have been unconstitutional and void.

If this be true, then the legislative powers granted to Congress under Section 1, Article I, of the Constitution, instead of being fixed and defined by that instrument, are shifting powers, or at least powers capable of expansion or contraction, as the President, and two-thirds of the Senators who happen to be present, may from time to time make or unmake treaties upon some particular subject. While Congress itself cannot make treaties and in this way *enlarge* its legislative powers, yet where a treaty has been made by the treaty-making authorities, Congress may, if it chooses, pass an Act in conflict with the treaty and so abrogate it and thus automatically cause a *shrinkage* in its legislative authority.

We strenuously insist that this extraordinary view is unsound. Our contention is that the legislative power of Congress, as fixed by the Constitution, cannot be increased or decreased by the making of a treaty, and that inasmuch as an Act of Congress standing alone would be ineffectual to take away from the individual states their power to control

the game birds of the state, this lack of authority cannot be supplied by making a treaty. The treaty-making power must be exercised "under the authority of the United States," which means that it can only act within the limits of the delegated powers of the national government and subject to the limitations prescribed by the Constitution itself.

It is interesting in this connection to note that by Clause 2 of Article VI of the Constitution it is provided that the Constitution and laws of the United States which shall be made in pursuance thereof shall be the supreme law of the land, whereas it is stated that treaties made or which shall be made "under the authority of the United States shall be the supreme law of the land." The use of the words "treaties made under the authority of the United States" was not accidental. The intention was to include treaties previously made by the United States under the articles of Confederation, which could not be described as made "in pursuance of the Constitution," for the reason that the Constitution was not then in existence. This is explained by William Rawle of Philadelphia in his work on the Constitution, page 66, where he says:

> There is a variance in the words descriptive of laws and those of treaties. In the former it is said those which shall be made in pursuance of the Constitution, but treaties are described as having been made, or which shall be made, under the authority of the United States. The explanation is that at the time of adopting the Constitution certain treaties existed, which had been made by Congress under the Confederation, the continuing obligations of which it was proper to declare. The words "under the authority of the United States" were considered as extending equally to those previously made and to those which should subsequently be effected. But although the former could not

be considered as made pursuant to a Constitution which was not then in existence, the latter would not be "under the authority of the United States" unless they are conformable to its Constitution.

The expression "made under the authority of the United States" can have no other meaning than made in pursuance of the authority conferred upon the United States by its Constitution. This is an obvious and important limitation upon the treaty-making power. Every treaty must find its warrant within the scope of the enumerated powers granted by the people to the United States, such as power to regulate commerce with foreign nations, to establish a uniform rule of naturalization, to define and punish piracies and felonies, to declare war, to raise and support armies, to provide and maintain a navy, etc.

Every instance in which a treaty has been sustained by the courts will be found to lie within the lawful domain of federal legislation. For illustration, numerous treaties concerning the rights of aliens within the United States have been sustained, and they are supported by the fact that under the Constitution the federal government retains control, supervision and authority over all aliens within their territory.

If the ruling of the lower court be correct, then a treaty with a foreign nation is a species of super-law beyond the power of Congress to enact. The President, with the concurrence of two-thirds of the Senators present, may thus make treaties which shall be the supreme law of the land upon a subject-matter quite beyond the legislative power of Congress. It would seem to follow as a necessary consequence of this doctrine that where a treaty thus beyond the Congressional legislative domain comes into force and effect as the supreme law of the land, it will be beyond the

power of Congress to modify or repeal it, and thus it will continue in effect indefinitely and for all time, with the permanency of a fixed star, unless it shall happen that the President and two-thirds of the Senators present, with the concurrence of some foreign nation, agree upon a new treaty which shall have the effect of either modifying or abrogating the prior one. The Migratory Bird Treaty with Great Britain is thus placed beyond the power of Congress to repeal or modify. Its only power is to enforce.

But fortunately no such legislative impasse is likely to occur. It is firmly established by repeated adjudication of this Court that a treaty and an Act of Congress stand upon an equal footing. They are of equal force. Neither one has any paramount authority over the other. A treaty will repeal a prior Act of Congress with which it is in conflict. An Act of Congress will repeal a prior treaty with which it conflicts. A treaty is said by this Court to be equivalent to an Act of a legislature. The reason of this rule is that both treaties and Acts of Congress have for their foundation the delegated powers granted by the Constitution. If a treaty were a super-law enacted in the exercise of a power beyond the legislative power of Congress, then it would necessarily result that an Act of Congress could not repeal it.

It is said by this Court in the Chinese Exclusion Case (130 U. S. 581), where a subsequent Act of Congress was held to effect a repeal of a prior treaty:

> *The treaties were of no greater legal obligation than the Act of Congress.* By the Constitution, laws made in pursuance thereof and treaties made under the authority of the United States are both declared to be the supreme law of the land, and *no paramount authority is given to one over the other.* A treaty, it is true, is in its nature a contract between nations, and is often

> merely promissory in its character, requiring legislation to carry its stipulations into effect. *Such legislation will be open to future repeal or amendment.* If the treaty operates by its own force, and relates to a subject within the power of Congress, it can be deemed in that particular only the equivalent of a legislative Act, to be repealed or modified at the pleasure of Congress. In either case the last expression of the sovereign will must control. * * *

A treaty which creates rights or imposes obligations upon the individual is regarded in courts of justice as equivalent to an Act of Congress. In *U. S.* v. *Rauscher*, 119 U. S. 407, the court said:

> A treaty is in its nature a contract between two nations, not a legislative Act. It does not generally effect, of itself, the object to be accomplished, especially so far as its operation is infraterritorial, but is carried into execution by the sovereign power of the respective parties to the instrument. In the United States a different principle is established. Our Constitution declares a treaty to be the law of the land. It is consequently to be regarded in courts of justice *as equivalent to an Act of the Legislature*, whenever it operates of itself, without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, *the treaty addresses itself to the political, not the judicial, department; and the Legislature must execute the contract before it can become a rule for the court. Foster* v. *Neilson*, 2 Pet. 253, 314 (27 U. S. bk. 7, L. Ed. 415, 435).

In the Head Money Cases, 112 U. S. 580, an Act of Congress of March 3, 1882, imposed upon the owners of steam or sailing vessels bringing passengers from a foreign port

into a port of the United States a duty of fifty cents for each such passenger not a citizen of this country. This was held to be a valid exercise of the power to regulate commerce with foreign nations. It was objected that the Act violated provisions in numerous treaties of our government with friendly nations. The court said:

> In short, we are of the opinion that so far as a treaty made by the United States with any foreign nation can become the subject of judicial cognizance in the courts of this country, *it is subject to such Acts as Congress may pass for its enforcement, modification, or repeal.*

In *Horner* v. *United States*, 143 U. S. 570, it is said:

> The proposition that that section is void if it contravenes a treaty between the United States and Austria is not tenable. *The statute is a law equally with the treaty, and, if subsequent and conflicting with the treaty, supersedes the latter.* Head Money Cases, 112 U. S. 580; *Whitney* v. *Robertson*, 124 U. S. 190; Chinese Exclusion Case, 130 U. S. 581.

In *United States* v. *Lee Yen Tai*, 185 U. S. 213, 220, it is said:

> That it was competent for the two countries by treaty to have superseded a prior Act of Congress on the same subject is not to be doubted; for otherwise the declaration in the Constitution that a treaty, concluded in the mode prescribed by that instrument, shall be the supreme law of the land, would not have due effect. As Congress may by statute abrogate, so far at least as this country is concerned, a treaty previously made by the United States with another nation, so the United States may by treaty supersede a prior Act of Congress on the same subject. In *Foster* v. *Neilson*, 2 Pet. 253, 314, 7 L. Ed. 415, 435, it was said that a treaty was

"to be regarded in courts of justice as *equivalent to an Act of the Legislature*, whenever it operates of itself without the aid of any legislative provision." In the case of The Cherokee Tobacco, 11 Wall. 616, 621, *sub. nom.* 207 *Half Pound Papers Smoking Tobacco* v. *United States*, 20 L. Ed. 227, 229, this court said: "A treaty may supersede a prior Act of Congress, and an Act of Congress may supersede a prior treaty." So, in the Head Money Cases, 112 U. S. 580, 599, *sub. nom. Edye* v. *Robertson*, 28 L. Ed. 798, 804, 5 Sup. Ct. Rep. 247, 254, this court said: "So far as a treaty made by the United States with any foreign nation can become the subject of judicial cognizance in the courts of this country, it is subject to such Acts as Congress may pass for its enforcement, modification or repeal." Again, in *Whitney* v. *Robertson*, 124 U. S. 190, 194, 31 L. Ed. 386, 388, 8 Sup. Ct. Rep. 456, 458: "By the Constitution a treaty is placed on the same footing and made of like obligation with an Act of legislation. *Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other.*"

It seems clear from the foregoing authorities that it is entirely competent for Congress, if it should choose to do so, to repeal the Migratory Bird Treaty with Great Britain of 1916 (assuming it to be valid). It could do so by passing an Act expressly repealing it or making some provision in conflict with it. Congress in so doing would be acting within the lawful scope of its legislative powers. How, then, can it be plausibly said that the treaty-making power is different in its scope from the legislative power of Congress or that it possesses any greater force and effect than an Act of Congress?

We respectfully submit that the doctrine that a treaty is a super-law, or that a treaty may act upon subjects beyond

the power of Congress to affect by direct legislation, is fundamentally unsound. If the Migratory Bird Treaty Act, without the treaty, would be invalid, as the lower court held, then it is inconceivable that it may be given life and vitality by the mere fact that it has a treaty behind it, which it seeks to put into effect.

III.

The treaty-making power of the national Government is limited by other provisions of the Constitution, including the Tenth Amendment. It cannot, therefore, divest a state of its police power or take away its ownership or control of its wild game.

The foundation of the lower court's judgment, as indicated in its opinion (Rec. 9, *et seq.*), is that, although the legislative power of Congress may not invade and control the police power of a state, yet this result may be accomplished by making a treaty with a foreign power. Before an exercise of the treaty-making power, it is said all state constitutions, state laws and all other powers, including *police powers*, are forced to yield. Our contention is that this doctrine is manifestly unsound. We insist that a state in the exercise of its powers of internal police, particularly in the control and administration of its own property, is exempt from the exercise of the treaty-making power, to the same extent as it is exempt from the exercise of the legislative power of Congress.

The treaty-making power of the national government, like every other constitutional power possessed by it, is subject to the restrictions and limitations of the Constitution itself, including the amendments. It cannot be so exercised as to nullify any other constitutional provision.

Thus the provisions in Section 9 of Article I that "no title of nobility shall be granted by the United States" cannot be nullified by the making of a treaty with some foreign power, creating hereditary titles; nor can the treaty-making power override the First Amendment of the Constitution prohibiting the making of any law respecting an establishment of religion, or abridging the freedom of the press, or the right of the people peaceably to assemble. Nor can a treaty defeat the right of the people to keep and bear arms, as provided in the Second Amendment. Nor can it confer the right to quarter soldiers in any house in time of peace, without the consent of the owner, in defiance of the Third Amendment. No one will contend that a treaty can detract from the force of the Fourth, Fifth, Sixth or Seventh or other amendments.

Mr. Wharton, in his "International Law Digest," Vol. II, paragraph 131a, quotes Dr. Ernest Meier, as follows:

> Congress has under the Constitution the right to lay taxes and imposts, as well as to regulate foreign trade, but the President and Senate, if the "treaty making power" be regarded as absolute, would be able to evade this limitation by adopting treaties which would compel Congress to destroy its whole tariff system. According to the Constitution, Congress has the right to determine questions of naturalization, of patents, and of copyright. Yet, according to the view here contested, the President and Senate, by a treaty, could on these important questions utterly destroy the legislative capacity of the House of Representatives. The Constitution gives Congress the control of the Army. Participation in this control would be snatched from the House of Representatives by a treaty with a foreign power by which the United States would bind itself to keep in the field an army of a particular size. The Constitution gives Congress the right of de-

> claring war; this right would be illusory if the President and Senate could by a treaty launch the country into a foreign war. The power of borrowing money on the credit of the United States resides in Congress; this power would cease to exist if the President and Senate could by treaty bind the country to the borrowing of foreign funds. By the Constitution "no money shall be drawn from the Treasury, but in consequence of appropriations made by law"; but this limitation would cease to exist if by a treaty the United States could be bound to pay money to a foreign power * * * Congress would cease to be the law-making power as is prescribed by the Constitution; the law-making power would be the President and the Senate. Such a condition would become the more dangerous from the fact that treaties so adopted being on this particular hypothesis superior to legislation, would continue in force until superseded by other treaties. Not only, therefore, would a congress consisting of two Houses be made to give way to an oligarchy of President and Senate, but the decrees of this oligarchy, when once made, could only be changed by concurrence of President and of senatorial majority of two-thirds.

The power of the national government to regulate commerce among the states and with foreign nations is limited by the provisions of the Fifth Amendment, so that under the guise of improving navigation the government cannot take private property without paying just compensation. In *Monongahela Navigation Company* v. *United States*, 148 U. S. 312, it is said:

> *But like the other powers granted to Congress by the Constitution, the power to regulate commerce is subject to all the limitations imposed by such instrument, and among them is that of the Fifth Amendment we have heretofore quoted.* Congress has su-

> preme control over the regulation of commerce, but if in exercising that supreme control it deems it necessary to take private property, then it must proceed subject to the limitations imposed by this Fifth Amendment, and can take only on payment of just compensation. The power to regulate commerce is not given in any broader terms than that to establish postoffices and post roads; but if Congress wishes to take private property upon which to build a postoffice, it must either agree upon the price with the owner or in condemnation pay just compensation therefor.

Will it be contended that the treaty-making power is not also subject to the Fifth Amendment? Can the government, under the authority of a treaty, take private property without making just compensation?

In *Prout* v. *Starr*, 188 U. S. 537, it is said:

> The Constitution of the United States, with the several amendments thereof, must be regarded as one instrument, all of whose provisions are to be deemed of equal validity.

Is not the treaty-making power, therefore, subject to the limitations imposed in the Tenth Amendment, which provides that the powers not delegated to the United States by the Constitution are reserved to the people? It is unthinkable that the treaty-making power should apply to the other amendments and not to the Tenth, and if the Tenth Amendment be a limitation of the treaty-making power, then it is beyond the authority of the national government to regulate the police power of a state, much less to regulate the use of property, such as wild game, which it is conceded belongs to the state.

If we for a moment indulge in the assumption that the treaty-making power of the government is not limited by

other provisions of the Constitution and by its amendments, including the Tenth Amendment, the most absurd and disastrous consequences will necessarily follow. For illustration, the prohibitory amendment recently ratified by the states will be nullified if the President and two-thirds of the Senate make a treaty with France covering the importation of wines, and with Great Britain covering the importation of whiskies, followed by congressional legislation in aid of the treaty establishing regulations for the drinking of intoxicating liquors. A treaty might be made with some native tribe in Africa providing for the importation of its natives and creating a condition of slavery and involuntary servitude, and thus the Thirteenth Amendment would become a nullity.

It was never intended that the treaty-making power should override the amendments to the Constitution, or extend beyond the lawful domain of federal legislation, or that it should invade the police powers of the states, or undertake to control the property of the states. It is said in *DeGeofroy* v. *Riggs*, 133 U. S. 258:

> The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, *and those arising from the nature of the government itself and of that of the states.* It would not be contended that it extends so far as to authorize what the Constitution forbids, *or a change in the character of the government or in that of one of the states*, or a cession of any portion of the territory of the latter, without its consent.

What are the restraints against the exercise of the treaty-making power "arising from the *nature* of the gov-

ernment itself and of that of the states" referred to in the foregoing quotation, except those arising from our dual form of government, wherein the national power, as defined by the Constitution, is complete within itself, and the reserved state power is likewise complete within itself? What is meant by "a change in the *character* of the government or in that of one of the states" which the court says is forbidden, unless it be a disarrangement of the relative legislative powers possessed by each? If the effect of a treaty be to take away from a state its reserved powers and give their exercise to the national government, that would immediately effect a change in the character of both the state and national government as they were originally fixed by the Constitution and the first ten amendments.

If a treaty may invade the reserved police powers of a state and transfer their exercise to the national government, the effect is far reaching and well nigh revolutionary. The states would be shorn of their power whenever the President and Senate saw fit to make a treaty with some foreign power. It is difficult to think of any attribute of sovereignty which would ultimately remain to the states if the treaty power be resorted to to supply the lack of power in Congress.

An interesting illustration may be drawn from Article 23 of the Treaty of Peace with Germany, which contains the following provision:

> Subject to and in accordance with the provisions of international conventions existing or hereafter to be agreed upon, the members of the League:
>
> (a) will endeavor to secure and maintain fair and humane conditions of labor for men, women, and children, both in their own countries and in all countries to which their commercial and industrial relations

extend, and for that purpose will establish and maintain the necessary international organizations.

If the United States becomes a party to this treaty, it is thereby invested with constitutional authority to control the employment of labor, in local industries, within each of the sovereign states, to determine the conditions of labor, to prescribe a minimum wage, to regulate hours of labor, to prohibit child labor, and to determine the innumerable questions of a similar character which have always been supposed to be a matter of state regulation, and to be removed from the control of the national government? If this be the result, the complete centralization of our government can be readily brought about by a free use of the treaty-making power.

But the framers of our Constitution never intended that the vesting of the treaty-making power in the national government should accomplish such extraordinary and revolutionary results. The reservation of the Tenth Amendment to the people of the states of all powers not expressly granted was intended as a limitation upon the treaty-making power as well as upon the legislative power of Congress. In the very matter of wild game, it is said by the court in *Geer* v. *State*, 161 U. S. 519, that the colonies possessed the right to control the taking of animals *ferae naturae*, and that this right passed to the states with their separation from the mother country. The states in the adoption of the Constitution reserved to themselves this same right by not granting it to the national government, and the Tenth Amendment was adopted as a guaranty to the states that all powers not granted to the national government were reserved to the people of the states.

In *Buffington* v. *Day*, 11 Wallace 113, it was held that Congress could not under the Constitution of the United

States impose a tax upon the salary of a judicial officer of the state. The court said:

> It is a familiar rule of construction of the Constitution of the Union that the sovereign powers vested in the state governments by their respective constitutions remained unaltered and unimpaired except so far as they were granted to the Government of the United States. That the intention of the framers of the Constitution in this respect might not be misunderstood, this rule of interpretation is expressly declared in the tenth article of the amendments, namely: "The powers not delegated to the United States are reserved to the states respectively, or to the people." The Government of the United States, therefore, can claim no powers which are not granted to it by the Constitution, and the powers actually granted must be such as are expressly given, or given by necessary implication.
>
> The general government and the states, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. The former, in its appropriate sphere, is supreme; *but the states within the limits of their powers not granted, or, in the language of the Tenth Amendment, "reserved," are as independent of the general government as that government within its sphere is independent of the states.*

The history of the adoption of the Tenth Amendment, the purpose to be served by it, and the liberality of construction to which it is fairly entitled, are expressed by Mr. Justice Brewer, speaking for this Court in *Kansas* v. *Colorado*, 206 U. S. 46. It is there said:

> The powers affecting the internal affairs of the states not granted to the United States by the Consti-

> tution, nor prohibited by it to the states, are reserved to the states respectively, and all powers of a national character which are not delegated to the national government by the Constitution are reserved to the people of the United States.

In *Hammer* v. *Dagenhart*, 247 U. S. 251, this Court said:

> The grant of power to Congress over the subject of interstate commerce was to enable it to regulate such commerce, and not to give it authority to control the states in their exercise of the police power over local trade and manufacture.
>
> *The grant of authority over a purely federal matter was not intended to destroy the local power always existing and carefully reserved to the states in the Tenth Amendment to the Constitution.*
>
> Police regulations relating to the internal trade and affairs of the states have been uniformly recognized as within such control. "This," said this court in *United States* v. *Dewitt*, 9 Wall. 41, 45, 19 L. Ed. 593, "has been so frequently declared by this court, results so obviously from the terms of the Constitution, and has been so fully explained and supported on former occasions, that we think it unnecessary to enter again upon the discussion." See *Keller* v. *United States*, 213 U. S. 138, 144, 145, 146, 29 Sup. Ct. 470, 53 L. Ed. 737, 16 Ann. Cas. 1066; Cooley's Constitutional Limitations (7th Ed.), p. 11.

The Tenth Amendment, it is respectfully submitted, is a barrier beyond which federal power may not assert itself except in the limited instances in the Constitution where a power has been delegated to the national government, the exercise of which is co-extensive with the territorial limits of the country. The power to regulate the currency of the country, the power to levy and collect internal revenue

taxes, the power to prescribe uniform laws of bankruptcy, are illustrations of the express powers conferred upon the national government by the Constitution, which are not reserved to the people under the Tenth Amendment. As to these powers Congress possesses the power of legislation, and to these subjects of legislation the treaty-making power may extend in appropriate cases.

But there has been no delegation by the states to the general government of any power of control or regulation over the property of the states, whether such property be real, personal, or mixed, or whether it consist of the title to the wild game of a state. Congress has no power to legislate; neither had the President and Senate any power to regulate by treaty.

In *Pierce* v. *State*, 13 N. H., it is said:

> An attempt on the part of the United States, by compact with a foreign government, to qualify the right of suffrage in a state, prescribe the time and mode of elections, or to restrain the power of taxation under state authority, would transcend the limits of the treaty-making power, and be entirely void; and an agreement with a foreign government, prescribing the terms on which highways should be laid out in the states, regulating the support of paupers, or the sale of goods by auctioneers, or by hawkers and peddlers, would be of the same character. The police of the several states, regarded as separate governments, is not a subject matter to which the treaty-making power extends. And it is not pretended that the treaties which admit liquors, the manufacture of other countries, into this, on the most favorable terms, contain any stipulations which purport to limit the legislation of the several states, after the import has taken the character of property within a state, the act of importation being fully accomplished and perfected.

> Nothing of that kind, it is believed, has been or will be attempted by the Government of the United States.

In *Ward* v. *Race Horse*, 163 U. S. 504 (reported in lower court, 70 Fed. 598), the facts were as follows:

Race Horse was a member of the Bannock tribe of Indians living on the Ft. Hale Indian reservation in Idaho. By Article 4 of a treaty duly consummated between the United States and his tribe in 1868 (15 Stat. 673) it was provided as follows:

> The Indians herein named agree, when the agency house and other buildings shall be constructed on their reservations named, they will make said reservations their permanent home, and they will make no permanent settlement elsewhere; *but they shall have the right to hunt upon the unoccupied lands of the United States so long as game may be found thereon, and so long as peace subsists among the whites and Indians on the borders of the hunting districts.*

By Act of Congress thereafter passed a territorial form of government was provided for the territory of Wyoming. Act July 25, 1868, c. 235, 15 Stat. 178. This Act provides as follows:

> Nothing in this Act shall be construed to impair the rights of persons or property now pertaining to the Indians in said territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians.

Wyoming was admitted as a state of the Union in 1890. In July, 1895, the Legislature of that state passed an Act regulating the killing of game within the state. Laws 1895, c. 98. Thereafter, in October, Race Horse killed

elk in Uinta county in that state on public lands of the United States, as he was authorized to do under the treaty made between the United States and his tribe, but in violation of the Act of the Legislature of the state of Wyoming. Being prosecuted under the laws of the state, he justified his conduct under the provision of the treaty with his tribe above quoted. He was convicted and sentenced under the state law. His application for discharge on a writ of *habeas corpus* being denied him, he appealed to the Supreme Court. Both the state law and the treaty being in full force at the time he killed the elk, the question presented was which should yield, the law of the state or the treaty of the government with his tribe, made by virtue of express authority of the national Constitution? Mr. Chief Justice White, delivering the opinion of the court, said:

> *The power of a state to control and regulate the taking of game cannot be questioned. Geer* v. *Connecticut,* 161 U. S. 519 (16 Sup. Ct. 600, 40 L. Ed. 793). * * * The argument now advanced, in favor of the continued existence of the right to hunt over the land mentioned in the treaty, after it had become a subject of state authority, admits that the privilege would cease by the mere fact that the United States disposed of its title to any of the land, although such disposition, when made to an individual, would give him no authority over game, and yet that the privilege continued when the United States had called into being a sovereign state, *a necessary incident of whose authority was the complete power to regulate the killing of game within its borders.* This argument indicates at once the conflict between the right to hunt in the unoccupied lands, within the hunting districts, and the assertion of the power to continue the exercise of the privilege in question in the state of Wyoming in defiance of its laws. * * * *The power of all*

> *the states to regulate the killing of game within their borders will not be gainsaid;* yet, if the treaty applies to the unoccupied land of the United States in the state of Wyoming, that state would be bereft of such power, since every isolated piece of land belonging to the United States as a private owner, so long as it continued to be unoccupied land, would be exempt in this regard from the authority of the state.

It was there held the simple fact of the admission of Wyoming into the Union as a state, possessing like and equal unrestricted control over the wild animal life within her borders, authorized the Legislature of the state, in the exercise of such plenary power of control, to prohibit and make criminal the doing of an act guaranteed by solemn treaty of the government to Race Horse as a member of his tribe.

In *Coyle* v. *Smith,* 221 U. S. 559 (s. c. 31 Sup. Ct. Rep. 688), the court held to be invalid a provision inserted in the Enabling Act for the admission of Oklahoma providing that the capital of the new state should be at the city of Guthrie until 1913, upon the ground that that was a matter over which the state had exclusive jurisdiction. In the course of its opinion the court referred to the case of *Ward* v. *Race Horse,* 163 U. S. 504, in the following language:

> In *Ward* v. *Race Horse,* 163 U. S. 504, 41 L. Ed. 244, 16 Sup. Ct. Rep. 1076, the necessary equality of the new state with the original states is asserted and maintained *against the claim that the police power of the state of Wyoming over its wild game had been restricted by an Indian treaty made prior to the admission of the state of Wyoming.*

In *Patsone* v. *Pennsylvania,* 232 U. S. 138, there was a statute of the state of Pennsylvania prohibiting any un-

naturalized foreign born resident of Pennsylvania from owning or having in his possession a shotgun for the purpose of killing any wild bird or animal. The defendant was a citizen of Italy and claimed the benefit of the treaty with Italy, giving to its citizens "the same rights and privileges as are or shall be granted to the natives," etc. The court said:

> It is to be remembered that the subject of this whole discussion is wild game, which the state may preserve for its own citizens if it pleases. *Geer* v. *Conn.*, 161 U. S. 519. *We see nothing in the treaty that purports or attempts to cut off the exercise of their powers over the matter by the states to the full extent.*

In *Heim* v. *McCall*, 239 U. S. 175, the court, referring to the Patsone case, *supra*, said:

> It was held that a law of Pennsylvania making it unlawful for unnaturalized foreign born residents to kill game, and to that end making the possession of shotguns and rifles unlawful, did not violate the treaty. Adopting the declaration of the court below, it was said "that the equality of rights that the treaty assures is equality only in respect of protection and security for persons and property." *And the ruling was given point by a citation of the power of the state over its wild game, which might be preserved for its own citizens.* In other words, the ruling was given point by the *special power of the state over the subject matter*—a power which exists in the case at bar, as we have seen.

In *Truax* v. *Raich*, 239 U. S. 33 (s. c. 36 S. C. R. 7), there came under consideration the validity of an Act of Arizona which provided that every employer who employs more than five workers at any one time shall employ not less than 80 per cent qualified electors or native born citi-

zens of the United States or some subdivision thereof. The complainant, a native of Austria, invoked the Fourteenth Amendment, and insisted that the Act was unconstitutional, and it was so held. The Patsone case was approved. The court in the course of its opinion said:

> The discrimination defined by the Act does not pertain to the regulation or distribution of the public domain, or of the *common property or resources of the people of the state*, the enjoyment of which may be limited to its citizens as against both aliens and the citizens of other states. Thus in *McCready* v. *Virginia*, 94 U. S. 391, 396, 24 L. Ed. 248, 249, the restriction to the citizens of Virginia of the right to plant oysters in one of its rivers was sustained upon the ground that the regulations related to the common property of the citizens of the state, and an analogous principle was involved in *Patsone* v. *Pennsylvania*, 232 U. S. 138, 145, 146, 58 L. Ed. 539, 544, 34 Sup. Ct. Rep. 281, *where the discrimination against aliens upheld by the court had for its object the protection of wild game within the states, with respect to which it was said that the state could exercise its preserving power for the benefit of its own citizens if it pleased.* The case now presented is not within these decisions, or within those relating to the devolution of real property (*Hauenstein* v. *Lynham*, 100 U. S. 483, 25 L. Ed. 628; *Blythe* v. *Hinckley*, 180 U. S. 333, 341, 342, 45 L. Ed. 557, 562, 563, 21 Sup. Ct. Rep. 390); and it should be added that the Act is not limited to persons who are engaged on public work or receive the benefit of public moneys. The discrimination here involved is imposed upon the conduct of ordinary private enterprise.

In *Cantini* v. *Tillman*, 54 Fed. 969, the Dispensary Law of South Carolina was under consideration and the complainant claimed rights under a treaty between Italy and the United States. It was held that the Dispensary Law being a reg-

ulation of the sale of liquor within the state was a matter of local regulation which was not affected by the treaty. The court said:

> Under these articles the complainants have the same rights as citizens of the United States. It would be absurd to say that they had greater rights. We have seen that the right to sell intoxicating liquors is not a right inherent in a citizen, and is not one of the privileges of American citizenship; that it is not within the protection of the fourteenth amendment; that it is within the police power. *The police power is a right reserved by the states, and has not been delegated to the general government. In its lawful exercise, the states are absolutely sovereign. Such exercise cannot be affected by any treaty stipulations.*

In *Leong Mow* v. *Board of Commissioners,* 185 Fed. 223, it was held that the Act of the Legislature of Louisiana, 1910, for the protection of birds, game, and fish, was valid as against a treaty with China which gave Chinese subjects the same privileges and rights as native citizens and provides that they should not be charged any higher imposts or duties than those paid by the natives. The court said:

> The bill in this case presents practically the same questions as the *Matter of John Ashon* v. *Board of Commissioners, etc.* (previously decided), 185 Fed. 221, with the exception that the plaintiff is a subject of the Emperor of China, and contends that Acts Nos. 245 and 132 of the Legislature of Louisiana, Session of 1910, discriminate against him, in violation of the treaties between China and the United States. He relies principally upon the most favored nation clause of the Chinese treaties, and refers to various treaties with European nations, all of which provide that citizens of foreign nations shall have the same privileges and rights and shall not be charged any higher imposts or duties than those paid by native citizens.

> I do not find that the rights contemplated by the general terms of said treaties include the right to fish; in fact, the right of fishing has been usually the subject of special treaties. *The state, as trustee for its citizens, owns the beds of all tide waters in its jurisdiction, the waters themselves, and the fish in them. The right to fish is a property right, and not a mere privilege of citizenship.* *McCready* v. *Virginia*, 94 U. S. 395, 24 L. Ed. 248.
>
> It is clear to my mind that *the treaties relied on by plaintiff do not prevent the state of Louisiana from prohibiting a subject of the Emperor of China from fishing in the waters of the state at all.* So it necessarily follows that, if permission is granted, the state can impose any condition it sees fit, notwithstanding the license fee exacted may be higher than that required of its own citizens.

In the case of *Wong Yung Quy*, 6 Sawy. 442, 451, it appeared that a statute of California made it an offense to disinter and remove from the place of burial the remains of a deceased without first having obtained a permit for which a fee of $10.00 was charged. It was held that this statute did not violate the provisions in Article IV of the treaty with China, which provided that Chinese subjects in the United States should enjoy entire liberty of conscience and should be exempt from all disability or persecution on account of their religious faith. Judge Sawyer said:

> Besides, it may well be questioned whether the treaty making power would extend to the protection of practices under the guise of religious sentiment deleterious to the public health or morals, *or to a subject matter within the acknowledged police power of the state.*

In *Compagnie Francaise de Navigation* v. *Board of Health*, 51 La. Ann., s. c. 25 So. Rep. 591, it is held that a

quarantine Act of the state of Louisiana establishing a board of health, and regulations made by it later, did not violate the treaties of the United States with France and Italy granting to the citizens of the latter countries the right of free visitation and trade, and *such treaties must be deemed to have been made with reference to, and subsidiary to, the rightful exercise by the state of its police power.* The court said:

> The conclusion we have reached as to the provisions of Act No. 192 not being unconstitutional as infringing upon the right and power of Congress to regulate commerce carries with it, *as a result*, the holding by this court that the Act was not in contravention of the treaties of the United States with France or Italy, or of the immigration laws of the general government, or of any rights secured by the Fourteenth Amendment to the Constitution of the United States. *The treaties and laws of the United States must be held to have been passed with reference to, and subsidiary to, the rightful exercise of the police power by the different states in aid of the protection and preservation of the public health within their respective borders.* We scarcely think it could be pretended that an Act of the General Assembly of Louisiana, under the provisions of which a shipload of citizens of the state of New York could be legally prevented from being landed in the city of New Orleans during an epidemic, could, by reason of a treaty, be held as against foreigners coming to our shores, to be inoperative, null and void. They could have no broader rights than our own citizens in this matter, and should be subjected to the same restrictions and inconveniences which they are, when these are demanded at their hands for the preservation and protection of the public health.

The case of *Compagnie Francaise* v. *State Board of Health*, 51 La. Ann. 645, quoted above, went to the Supreme

Court of the United States and was there affirmed (22 Sup. Ct. Rep. 811), the court saying:

> Reliance is placed, to sustain this proposition, on the provisions of a treaty concluded with the Kingdom of Italy on February 26, 1871; on the terms of a treaty with Great Britain of July 3, 1815, as also a treaty between the United States and the Kingdom of Greece, concluded December 22, 1837, and one concluded with the Kingdom of Sweden and Norway on July 4, 1827. The treaties of other countries than Italy are referred to upon the theory that as by the treaty concluded with France on April 30, 1803, by which Louisiana was acquired, it was provided that France should be treated upon the footing of the most favored nation in the ports of the ceded territory, therefore the treaties in question made with other countries than France were applicable to the plaintiff in error, a French subject. Conceding *arguendo*, this latter proposition, and therefore assuming that all the treaties relied on are applicable, we think it clearly results from their context that *they were not intended to, and did not, deprive the government of the United States of those powers necessarily inhering in it and essential to the health and safety of its people.* We say the United States, because if the treaties relied on have the effect claimed for them that effect would be equally as operative and conclusive against a quarantine established by the government of the United States as it would be against a state quarantine operating upon and affecting foreign commerce by virtue of the inaction of Congress. Without reviewing the text of all the treaties, we advert to the provisions of the one made with Greece, which is principally relied upon. The text of Article 15 of this treaty is the provision to which our attention is directed, and it is reproduced in the margin.
>
> It is apparent that it provides only the particular form of document which shall be taken by a ship of the Kingdom of Greece and reciprocally by those of the United States for the purpose of establishing that infec-

tious or contagious diseases did not exist at the point of departure. But it is plain from the face of the treaty that the provision as to the certificate was not intended to abrogate the quarantine power, since the concluding section of the article in question expressly subjects the vessel holding the certificate to quarantine detention if, on its arrival, a general quarantine had been established against all ships coming from the port whence the vessel holding the certificate had sailed. In other words, the treaty having provided the certificate and given it effect, under ordinary conditions, proceeds to subject the vessel holding the certificate to quarantine, if, on its arrival, such restriction had been established in consequence of infection deemed to exist at the port of departure. *Nothing in the text of the treaty, we think, gives even color to the suggestion that it was intended to deal with the exercise by the government of the United States of its power to legislate for the safety and health of its people or to render the exertion of such power nugatory by exempting the vessels of the Kingdom of Greece, when coming to the United States, from the operation of such laws. In other words, the treaty was made subject to the enactment of such health laws as the local conditions might evoke not paramount to them. Especially where the restriction imposed upon the vessel is based, not upon the conditions existing at the port of departure, but upon the presence of an infectious or contagious malady at the port of arrival within the United States, which, in the nature of things, could not be covered by the certificate relating to the state of the public health at the port whence the ship had sailed.*

The following from the dissenting opinion of Mr. Justice Brown and Mr. Justice Harlan is significant:

> If the law in question in Louisiana, excluding French ships from all access to the port of New Orleans, be not a violation of the provision of the treaty that

vessels "shall be subjected to no other quarantine than such as may be necessary for the visit of the health officer of the port where such vessels shall have arrived, after which said vessels shall be allowed immediately to enter and unload their cargoes," I am unable to conceive a state of facts which would constitute a violation of that provision.

In *People of the State of New York* v. *Becker,* 241 U. S. 556, s. c. 36 Sup. Ct. Rep. 705, the United States by treaty with the Seneca Indians conveyed certain land with a reservation in favor of the Indians of "the privilege of fishing and hunting on the said tract of land hereby intended to be conveyed." After the lands in question had become a part of New York state, three Seneca Indians were arrested for fishing within the limits of the lands covered by the treaty. *It was held that with the coming of statehood the jurisdiction of the state over the property extinguished the fishing and hunting rights granted by the treaty.* The court said:

> The right thus reserved was not an exclusive right. Those to whom the lands were ceded, and their grantees, and all persons to whom the privilege might be given, would be entitled to hunt and fish upon these lands, as well as the Indians of this tribe. And, with respect to this nonexclusive right of the latter, it is important to observe the exact nature of the controversy. It is not disputed that these Indians reserved the stated privilege both as against their grantees and all who might become owners of the ceded lands. We assume that they retained an easement, or profit *a prendre*, to the extent defined; that is not questioned. The right asserted in this case is against the state of New York. It is a right sought to be maintained in derogation of the sovereignty of the state. It is not a claim for the vindication of a right

of private property against any injurious discrimination, for the regulations of the state apply to all persons equally. It is the denial with respect to these Indians, and the exercise of the privilege reserved, *of all state power of control or reasonable regulation as to lands and waters, otherwise admittedly within the jurisdiction of the state.*

It is not to be doubted that the power to preserve fish and game within its borders is inherent in the sovereignty of the state (*Geer* v. *Connecticut,* 161 U. S. 519, 40 L. Ed. 793, 16 Sup. Ct. Rep. 600; *Ward* v. *Race Horse,* 163 U. S. 504, 507, 41 L. Ed. 244, 245, 16 Sup. Ct. Rep. 1076) subject, of course, to any valid exercise of authority under the provisions of the Federal Constitution. It is not denied—save as to the members of this tribe—that this inherent power extended over the *locus in quo* and to all persons attempting there to hunt or fish, whether they are owners of the lands or others. The contention for the plaintiffs in error must, and does, go to the extent of insisting that the effect of the reservation was to maintain in the tribe sovereignty *quoad hoc.* As the plaintiffs in error put it: "The land itself became thereby subject to a joint property ownership and the dual sovereignty of the two peoples, white and red, to fit the case intended, however infrequent such situation was to be." We are unable to take this view. It is said that the state would regulate the whites and that the Indian tribe would regulate its members, but if neither could exercise authority with respect to the other at the *locus in quo,* either would be free to destroy the subject of the power. *Such a duality of sovereignty, instead of maintaining in each the essential power of preservation, would in fact deny it to both.* * * *. But the existence of the sovereignty of the state was well understood, and this conception involved all that was necessarily implied in that sovereignty, whether fully appreciated or not. We do not think that it is a proper construction of the reservation in

> the conveyance to regard it as an attempt either to reserve sovereign prerogative, or so to divide the inherent power of preservation as to make its competent exercise impossible. *Rather are we of the opinion that the clause is fully satisfied by considering it a reservation of a privilege of fishing and hunting upon the granted lands in common with the grantees, and others to whom the privilege might be extended, but subject, nevertheless, to that necessary power of appropriate regulation, as to all those privileged, which inhered in the sovereignty of the state over the lands where the privilege was exercised.*

In *George* v. *Pierce*, 148 N. Y. Supp. 230, it appeared that the state of New York had made treaties with the Onondaga Indians prior and during the existence of the Articles of Confederation and also after the adoption of the Constitution in 1789, by the terms of which the Indians ceded to the state of New York all their lands except certain tracts reserved for the use of the Indians.

In 1795 the United States made a treaty with the six nations whereby it acknowledged the land reserved to the Onondaga Indians in a treaty with the state of New York to be their property, and specified that the same "shall remain theirs until they choose to sell the same to the people of the United States who have the right to purchase." The court said, p. 237:

> The United States government thus recognized the rights of the state to make treaties with the Onondagas as to their lands, not only under the Articles of Confederation, but under the Constitution, recognized that such agreements are not such treaties as states are prohibited from making. How far the treaty interfered with the pre-emptive rights of the state is another question. It is true that this treaty was "constitutionally made in the exercise of the treaty-making power

of the federal government, and became under the Constitution the supreme law." *Seneca Nation* v. *Christie*, 126 N. Y. 122-139, 27 N. E. 275. It is also true that all judges are bound thereby.

But if this treaty was an attempt to transfer from the people of the state to the people of the United States the fee and the right of pre-emption of the Onondaga lands it would be in so far ineffective. A reasonable construction must be given to the Constitution, having regard to the circumstances under which it was formed and its purposes. *The authority of the United States as to treaties is not unlimited. It may not, under the guise of a treaty, deprive a state of those governmental powers which are a part of its inherent rights. It may not transfer its property.* *Geofroy* v. *Riggs*, 133 U. S. 258, 10 Sup. Ct. 295, 33 L. Ed. 642; *Provost* v. *Greenaux*, 19 How. 1, 15 L. Ed. 572; *Seneca Nation* v. *Christie*, 125 N. Y. 122-143, 27 N. E. 275. Probably, however, such a result was never intended. Certainly no such effect has ever been given to this treaty. For in July, 1795, in February, 1817, and in February, 1822, three treaties were made between the state and the Onondagas, whereby the latter ceded to the people portions of their reservation, until there were left to them the 7,300 acres they now occupy.

In *Bondi* v. *MacKay*, 89 Atl. 228, it appeared that a Vermont statute imposed a higher hunter's license as against an alien than a resident. A citizen of Italy claimed that the treaty between the United States and Italy gave him the same rights as a resident. The court held that the treaty was not operative in respect to the subject-matter which was within the exclusive control of the state in the exercise of its police power. The court said:

The nature of all property interests in wild game is fully set forth in our decisions. "The wild game in the state belongs to the people of the state in their collect-

ive and sovereign capacity, and not in their individual and private capacity, except so far as private ownership may be acquired therein under the Constitution. * * *

Zanetta v. *Boles*, 80 Vt. 345, 67 Atl. 818. See also, *State* v. *Niles*, 78 Vt. 266, 62 Atl. 795, 112 Am. St. Rep. 917; *Payne* v. *Sheets*, 75 Vt. 335, 55 Atl. 656; *State* v. *Haskell*, 84 Vt. 429, 79 Atl. 852, 34 L. R. A. (N. S.) 286. The right of the Legislature, in the exercise of the police power, to take measures for the preservation and increase of this common property is fully recognized. *State* v. *Theriault*, 70 Vt. 617, 41 Atl. 1030, 43 L. R. A. 290, 67 Am. St. Rep. 695. It is equally within the power of the Legislature to provide for and regulate its decrease, if its development becomes injurious to other property rights. * * *

The petitioner urges, further, that the provision, as we construe it, is in conflict with the treaty between the United States and Italy (17 Stat. 845), in that it denies him rights and privileges to which the treaty entitles him. The provision in question is, in substance, that the citizens of each country shall receive in the states and territories of the other the most constant security and protection for their persons and property, and shall enjoy in this respect *the same rights and privileges which are granted to natives*, provided that they submit themselves to the conditions imposed on natives. The treaties of the United States are the law of the land, superior to the Constitution and statutes of any state, and binding upon all courts. Const. U. S. Art. 6. Treaty provisions which confer rights upon the subjects of another nation residing in this country partake of the nature of municipal law, and when the right conferred is one that can be enforced in a court of justice, and the treaty prescribes a rule by which the right is to be determined, the court resorts to the treaty for the rule of decision as it would to a statute. *Edye* v. *Robertson*, 112 U. S. 580, 5 Sup. Ct. 247, 28 L. Ed. 798. The provision under consideration is to receive a reasonable construction, having reference to the pur-

> pose of the treaty and the intention of the contracting parties. Under this provision the Italians residing here are to receive complete protection for the property they have or may acquire, and are to have in respect to such property the rights and privileges granted to natives. *But there is nothing in this which entitles them to share equally with the natives in such privileges as the Legislature may grant in the wild game of the state, and nothing which seems intended to protect them from the minor discriminations incident to the ordinary exercise of the police power.*
>
> Our conclusion is that the petitioner, although by the agreed statement a resident of Barre, is not entitled to a resident hunter's license, because not a citizen of the United States and of this state.

In *Downes* v. *Bidwell*, 182 U. S. 318 (s. c. 21 Sup. Ct. Rep. 770, 796), it was held that the island of Porto Rico by the treaty of cession became territory appurtenant to the United States, but not a part of the United States within the revenue clauses of the Constitution. In the course of a concurring opinion, Mr. Justice White, with whom concurred Mr. Justice Shiras and Mr. Justice McKenna, said:

> Let me come, however, to a consideration of the express powers which are conferred by the Constitution, to show how unwarranted is the principle of immediate incorporation (of territory acquired by treaty) which is here so strenuously insisted on. In doing so it is conceded at once that the true rule of construction is not to consider one provision of the Constitution alone, but to contemplate all, and therefore to limit one conceded attribute by those qualifications which naturally result from the other powers granted by that instrument, so that the whole may be interpreted by the spirit which vivifies, and not by the letter which killeth. Undoubtedly, the power to carry on war and to make treaties implies also the exercise of those incidents

which ordinarily inhere in them. Indeed, in view of the rule of construction which I have just conceded—that all powers conferred by the Constitution must be interpreted with reference to the nature of the government and be construed in harmony with related provisions of the Constitution—it seems to me impossible to conceive that the treaty-making power by a mere cession can incorporate an alien people into the United States without the express or implied approval of Congress. And from this it must follow that there can be no foundation for the assertion that, where the treaty-making power has inserted conditions which preclude incorporation until Congress has acted in respect thereto, such conditions are void and incorporation results in spite thereof. *If the treaty-making power can absolutely, without the consent of Congress, incorporate territory, and if that power may not insert conditions against incorporation, it must follow that the treaty-making power is endowed by the Constitution with the most unlimited right, susceptible of destroying every other provision of the Constitution; that is, it may wreck our institutions. If the proposition be true, then millions of inhabitants of alien territory, if acquired by treaty, can, without the desire or consent of the people of the United States speaking through Congress, be immediately and irrevocably incorporated into the United States, and the whole structure of the Government be overthrown.* While thus aggrandizing the treaty-making power on the one hand, the construction at the same time minimizes it on the other, in that it strips that authority of any right to acquire territory upon any condition which would guard the people of the United States from the evil of immediate incorporation. The treaty-making power, then, under this contention, instead of having the symmetrical functions which belong to it from its very nature, becomes distorted, vested with the right to destroy upon the one hand, and deprived of all power to protect the government on the other.

> And, looked at from another point of view, the effect of the principle asserted is equally antagonistic, not only to the express provisions, but to the spirit of the Constitution in other respects. Thus, if it be true that the treaty-making power has the authority which is asserted, what becomes of that branch of Congress which is peculiarly the representative of the people of the United States, and what is left of the functions of that body under the Constitution? For, although the House of Representatives might be unwilling to agree to the incorporation of alien races, it would be impotent to prevent its accomplishment, and the express provisions conferring upon Congress the power to regulate commerce, the right to raise revenue—bills for which, by the Constitution, must originate in the House of Representatives—and the authority to prescribe uniform naturalization laws, *would be in effect set at naught by the treaty-making power.* And the consequent result—incorporation—would be beyond all future control of or remedy by the American people, since *at once and without hope of redress or power of change*, incorporation by the treaty would have been brought about. The inconsistency of the position is at once manifest. The basis of the argument is that the treaty must be considered to have incorporated, because acquisition presupposes the exercise of judgment as to fitness for immediate incorporation. But the deduction drawn is, although the judgment exercised is against immediate incorporation and this result is plainly expressed, the conditions are void because no judgment against incorporation can be called into play.

The Chief Justice, with whom concurred Mr. Justice Harlan, Mr. Justice Brewer and Mr. Justice Peckham, said, in the same case (21 S. C. Rep. 819):

> Indeed, a treaty which undertook to take away what the Constitution secured, *or to enlarge the Federal jurisdiction*, would be simply void.

It need hardly be said that a treaty cannot change the Constitution, or be held valid if it be in violation of that instrument. This results from the nature and fundamental principles of our government. *The Cherokee Tobacco*, 11 Wall. 620, *sub nom.* 207 *Half Pound Papers of Smoking Tobacco* v. *United States*, 20 L. Ed. 229.

So, Mr. Justice Field in *Geofroy* v. *Riggs*, 133 U. S. 267, 33 L. Ed. 645, 10 Sup. Ct. Rep. 297: "The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising *from the nature of the government itself and of that of the states.* It would not be contended that it extends so far as to authorize what the Constitution forbids, or *a change in the character of the government or in that of one of the states*, or a cession of any portion of the territory of the latter, without its consent."

And it certainly cannot be admitted that the power of Congress to lay and collect taxes and duties can be curtailed by an arrangement made with a foreign nation by the President and two-thirds of a quorum of the Senate. See 2 Tucker, Const., Secs. 354, 355, 356.

In the language of Judge Cooley: "The Constitution itself never yields to treaty or enactment; it neither changes with time nor does it in theory bend to the force of circumstances. It may be amended according to its own permission; but while it stands it is 'a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times and under all circumstances.' Its principles cannot, therefore, be set aside in order to meet the supposed necessities of great crises. No doctrine involving more pernicious consequences was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government.

Mr. Justice Harlan, in the same case, said (21 S. C. Rep. 826):

> Of course no territory can become a state in virtue of a treaty or without the consent of the legislative branch of the government; for only Congress is given power by the Constitution to admit new states.

Mr. Justice Daniel in his separate opinion in the License cases, 5 How. 504, 611, said:

> By the 6th article and 2d clause of the Constitution it is thus declared: "That this Constitution and the laws of the United States made in pursuance thereof, and treaties made under the authority of the United States, shall be the supreme law of the land."
>
> This provision of the Constitution, it is to be feared, is sometimes applied or expounded without those qualifications which the character of the parties to that instrument, and its adaptation to the purposes for which it was created, necessarily imply. Every power delegated to the federal government must be expounded in coincidence with a perfect right in the States to all that they have not delegated; in coincidence, too, with the possession of every power and right necessary for their existence and preservation; for it is impossible to believe that these ever were, in intention or in fact, ceded to the general government. *Laws of the United States, in order to be binding, must be within the legitimate powers vested by the Constitution. Treaties, to be valid, must be made within the scope of the same powers; for there can be no "authority of the United States," save what is derived mediately or immediately and regularly and legitimately, from the Constitution.* A treaty, no more than an ordinary statute, can arbitrarily cede away any one right of a state or any citizen of a state.

Mr. Chief Justice Taney, in the Passenger cases, 7 How. 283 (12 L. Ed. 281), said, in the course of his dissenting opinion:

> And the first inquiry is, whether, under the Constitution of the United States, the federal government has the power to compel the several states to receive, and suffer to remain in association with its citizens, every person or class of persons whom it may be the policy or pleasure of the United States to admit. In my judgment this question lies at the foundation of the controversy in this case. I do not mean to say that the general government have, by treaty or act of Congress, required the state of Massachusetts to permit the aliens in question to land. I think there is no treaty or Act of Congress which can justly be so construed. But it is not necessary to examine that question until we have first inquired whether Congress can lawfully exercise such a power, and whether the states are bound to submit to it. For if the people of the several states of this Union reserved to themselves the power of expelling from their borders any person, or class of persons, whom it might deem dangerous to its peace, or likely to produce a physical or moral evil among its citizens, *then any treaty or law of Congress invading this right, and authorizing the introduction of any person or description of persons against the consent of the state, would be an usurpation of power which this court could neither recognize nor enforce.* I had supposed this question not now open to dispute. It was distinctly decided in *Holmes* v. *Jennison* (14 Pet. 540), in *Groves* v. *Slaughter* (15 Pet. 449), and in *Prigg* v. *The Commonwealth of Pennsylvania* (16 Pet. 439).

In *Holmes* v. *Jennison*, 14 Pet. 616, Mr. Justice Baldwin uses the following language:

> Every state has acknowledged power to pass and enforce quarantine, health and inspection laws to prevent

> the introduction of disease, pestilence or unwholesome provisions; such laws interfere with no power of Congress or *treaty stipulations;* they regulate internal police, and are subjects of domestic regulation within each state, over which no authority can be exercised by any power under the Constitution, save by requiring the consent of Congress to the imposition of duties on exports or imports, and their payment into the treasury of the United States.

And at page 619 he says:

> Whenever internal police is the object, *the power is excepted from every grant and reserved to the states.*

In Tucker's Limitations on the Treaty-Making Power, p. 339, the author states his conclusions as follows:

> A careful consideration of the relation of the states to the Federal Government, and the purposes and objects for which the Government was formed, together with an examination of the provisions of the Constitution itself, lead strongly to the conclusion that no essential power of a state, whether a reserved power or a police power, can by reasonable construction be constitutionally taken from it, in furtherance of the treaty-making power.

In the Virginia Convention which adopted the Constitution, Patrick Henry objected to the treaty-making provision of the proposed Constitution. He urged that the President and two-thirds of a quorum of the Senate "might relinquish and alienate territorial rights, and our most valuable commercial advantages. In short, if anything should be left us, it would be because the President and Senators were pleased to admit it."

Mr. George Mason likewise declared "That there is nothing in that Constitution to hinder a dismemberment

of the empire. Will any gentlemen say that they may not make a treaty, whereby the subjects of France, England and other powers may buy what lands they please in this country?"

George Nicholas in defending the provisions said:

> The provision of the 6th article is, that this Constitution, and the laws of the United States which shall be made in pursuance thereof, and all the treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land. *They can, by this, make no treaty which shall be repugnant to the spirit of the Constitution, or inconsistent with the delegated powers.* The treaties they make must be under the authority of the United States to be within their province. It is sufficiently secured, because it only declares that, in pursuance of the powers given, they shall be the supreme law of the land, notwithstanding anything in the Constitution or laws of particular states.

Mr. Madison, in his concluding argument on the subject, said:

> I think it (the treaty provision) rests on the safest foundation as it is. The object of treaties is the regulation of intercourse with foreign nations, *and is external.* I do not think it possible to enumerate all the cases in which such *external regulations* would be necessary. Would it be right to define all the cases in which Congress could exercise this authority? The definition might, and probably would, be defective.

In *House* v. *Mayes*, 219 U. S. 270 (s. c. 31 Sup. Ct. Rep. 234), the court said:

> Briefly stated, those principles are: That the government created by the Federal Constitution is one of enumerated powers, and cannot, by any of its

agencies, exercise an authority not granted by that instrument, either in express words or by necessary implication; that a power may be implied when necessary to give effect to a power expressly granted; that while the Constitution of the United States and the laws enacted in pursuance thereof, *together with any treaties made under the authority of the United States,* constitute the supreme law of the land, a state of the Union may exercise all such governmental authority as is consistent with its own Constitution, and not in conflict with the Federal Constitution; that such a power in the state, generally referred to as its police power, is not granted by or derived from the Federal Constitution, but exists independently of it, by reason of its never having been surrendered by the state to the general government; that among the powers of the state, not surrendered—which power therefore remains with the state—is the power to so regulate the relative rights and duties of all within its jurisdiction as to guard the public morals, the public safety, and the public health, as well as to promote the public convenience and the common good; and that it is with the state to devise the means to be employed to such ends, taking care always that the means devised do not go beyond the necessities of the case, have some real or substantial relation to the objects to be accomplished, and are not inconsistent with its own Constitution or the Constitution of the United States.

Are we not justified, therefore, in our contention that the treaty-making power "under the authority of the United States" is limited by the Tenth Amendment and may not transcend the legislative power of Congress under the Constitution? If this be true, it necessarily results that the states of Missouri and Kansas have never been divested of their right under the police power to regulate and control the hunting and taking of game birds within their re-

spective jurisdictions, and they, and not Congress, have exclusive power of control over that field of legislation.

IV.

The courts have never upheld a treaty whose subject matter extended beyond the constitutional domain of Congressional legislation.

Several of the powers delegated to the national government by the Constitution of the United States affect the control of the local affairs of the state. Treaties, as well as acts of Congress, may operate within, but not beyond, the scope of these powers.

Thus the authority to control immigration, to admit or exclude aliens, is vested solely in the federal government (*Fong Yue Ting* v. *U. S.*, 149 U. S. 698, 713; *Truax* v. *Raich*, 239 U. S. 33; Chinese Exclusion cases, 130 U. S. 581). It may directly through legislation, or by treaty, control aliens during their residence in this country, require them to register, deport them if deemed advisable, and in general throw around them such safeguards as may be deemed necessary.

In *Yamataya* v. *Fisher*, 189 U. S. 86 (23 Sup. Ct. Rep. 611), it is said:

> The constitutionality of the legislation in question, in its general aspects, is no longer open to discussion in this court. That Congress may exclude aliens of a particular race from the United States; prescribe the terms and conditions upon which certain classes of aliens may come to this country; establish regulations for sending out of the country such aliens as come here in violation of law; and commit the enforcement of such provisions, conditions, and regulations exclusively to executive officers, without judicial intervention—are

principles firmly established by the decisions of this court. *Nishimura Ekiu* v. *United States,* 142 U. S. 651, 35 L. Ed. 1146, 12 Sup. Ct. Rep. 336; *Fong Yue Ting* v. *United States,* 149 U. S. 698, 37 L. Ed. 905, 13 Sup. Ct. Rep. 1016; *Lem Moon Sing* v. *United States,* 158 U. S. 538, 39 L. Ed. 1082, 15 Sup. Ct. Rep. 967; *Wong Wing* v. *United States,* 163 U. S. 228, 41 L. Ed. 140, 16 Sup. Ct. Rep. 977; *Fok Yung Yo* v. *United States,* 185 U. S. 296, 305, 46 L. Ed. 917, 921, 22 Sup. Ct. Rep. 686, 690.

Aliens are entitled to the protection of the Fourteenth Amendment (*Truax* v. *Raich,* 239 U. S. 33). Many of our treaties concern the rights of aliens while in this country, to hold property by purchase or by descent or to administer upon the estates of their fellow countrymen. The effect of such treaties is to *remove the disability of alienage;* but they do not qualify or modify or interfere with the laws of descent of the different states.

In *Fairfax's Devisee* v. *Hunter's Lessee,* 7 Cranch. 603, it was held that the treaty of 1794 with Great Britain removed the disability of alienage so as to permit Fairfax, a British subject, to take by descent, notwithstanding the law of Virginia. In *Chirac* v. *Chirac,* 2 Wheat. 259, a treaty with France gave to the subjects of France the right to purchase and hold lands in the United States, and it was held that a French subject had the right to sell or otherwise dispose of lands acquired by descent or devise in a state where, except for the treaty, they would escheat to the state. In *Geofroy* v. *Riggs,* 133 U. S. 258, it was held that a treaty with France made in 1800 giving to the citizens of France the right of taking by inheritance from citizens of the United States, permitted them so to do, notwithstanding the provisions of the common law. To the same effect are *Hauenstein* v. *Lynham,* 100 U. S. 483, and a number

e[illegible] decisions cited in Crandall on Treaties, Their M[illegible]king and Enforcement (2d Ed.), p. 250.

So, also, treaties have been upheld which give the right to a foreign consul to administer affairs of a deceased fellow c[illegible]ntryman. (*McEvoy* v. *Wyman*, 191 Mass. 276; *Succession of Rabasse*, 47 La. Ann. 1452.) It may be doubted, however, if these cases were properly decided, in view of *Rocca* v. *Thompson*, 223 U. S. 317; *In re D'Adamo's Estate*, 212 N. Y. 241; *In re Servas's Estate*, 146 Pac. Rep. 651, and *In re Lis's Estate*, 139 N. W. Rep. 300.

All of these cases, however, are instances of the assertion of the conceded power of the general government to legislate concerning the status, duties, obligations, and privileges of aliens residing in this country. As the power of national legislation exists, so also the power exists to make treaties.

None of the adjudicated cases upon this subject indicate that the treaty-making power may lawfully extend beyond the lawful domain of federal legislation.

Congress is expressly authorized to regulate commerce with the Indian tribes, and this power may be exercised directly by legislative acts, or by treaty. Thus in *U. S.* v. *Sandoval*, 231 U. S. 28, an indictment was found for introducing intoxicating liquor into the Santa Clara Pueblo in the state of New Mexico. The defense was that the act of Congress on which the prosecution was based and which was a part of the Enabling Act providing for the admission of New Mexico as a state, was invalid because it invaded the police power of the state. It was held, however, that inasmuch as the congressional legislation was a legitimate exercise of the power of Congress to regulate commerce with the Indian tribes, it did not encroach upon the

police power of the state or disturb the principle of equality among the states. To the same effect are *Brader* v. *James*, 246 U. S. 88, and *Talley* v. *Burgess*, 246 U. S. 104.

It is apparent that the power of the government over Indians, whether referred to the commerce clause in the Constitution, or the general power of the government over them as the wards of the nation, is plenary, and may be exercised either by act of Congress or by treaty. There is no invasion of the right reserved to the people by the Tenth Amendment.

The respective powers of the government and of the states over a particular subject matter is illustrated by the existing situation with respect to the employment of child labor. In the case of *Hammer* v. *Dagenhart*, 247 U. S. 251 (38 Sup. Ct. Rep. 529), it was held that an act of Congress which attempted to regulate the employment of child labor was void because commerce between the states, which was the limit of congressional authority, was not involved. On the other hand, in the recent income tax bill approved in February, 1919 (the validity of which is now before this Court for decision), a tax is laid upon the income from child labor, under the constitutional power to lay and collect taxes. In other words, the government invokes the rule that while the power to regulate commerce among the states cannot invade the police power of the state, yet the power to lay and collect taxes on incomes recognizes no territorial limit, but is effective everywhere within the United States.

The lower court refers to the opinion of Attorney General Griggs, 22 Opinions of Attorneys General 214. It is there ruled that the United States by treaty with Great

Britain may regulate fishing in the waters contiguous to the territory of the United States and Canada along the international boundary line from the Atlantic to the Pacific ocean and on the Great Lakes. The waters of the lakes and rivers forming the boundary between the United States and Canada upon this side of the boundary line are within the territorial jurisdiction of the several riparian states.

The ruling of the Attorney General was to the effect that *although the regulation of these fisheries was beyond the power of Congress,* yet the object might be attained by making a treaty with Great Britain, and that such a treaty, when made, superseded the laws of the several states.

For the reasons which have been heretofore stated, we respectfully submit that the opinion was erroneous in this respect. Our contention is that treaties may not operate upon subjects concerning which Congress has no power to legislate.

The Attorney General also says that the several states are by the Constitution forbidden to enter into any such agreement with a foreign power, and that unless the United States may regulate the subject by treaty, it is impossible of regulation. This, we respectfully submit, entirely overlooks the inherent power which a state possesses as an attribute of its sovereignty to prescribe rules and regulations for the administration of its own property, to the exclusion of any other authority, and to make compacts and agreements in reference thereto with other states or with a foreign power.

The treaty-making power is to be applied to the delegated powers of the central government as expressed in the Constitution. It takes them as it finds them. It can neither

add to nor take from. If these delegated powers are of such a nature that they may be exercised within the local affairs of the states, the treaty power may do likewise. If they may not invade the police power of the states, the treaty power is limited in the same manner. To the extent that powers possessed by the United States have been delegated to it by the public, they have not been reserved by the Tenth Amendment. But to the extent that powers have not been thus delegated, and so have been reserved to the people, neither Congress nor the treaty-making power can exercise any authority.

The situation is the same as though the Constitution had read:

> To the extent that power has been delegated by the people to the national government, Congress may act and the treaty-making power may act, and when they have thus acted, the laws or the treaties, as the case may be, shall be the supreme law of the land. All matters to which the delegated power of Congress does not extend are reserved to the states in the exercise of their own sovereignty. Where, for this reason, an act of Congress would be void, there also a treaty is without validity.

The Act of Congress of 1913, undertaking to regulate the game laws of the states, was void because of the lack of power in the national government to control a subject matter within the exclusive jurisdiction of the state legislatures. For the same reason the Treaty of 1916 was invalid. The Act of 1918 is subject to the same infirmity.

V.

The lower court held that an act of Congress undertaking to regulate the game birds of a state would be unconstitutional in the absence of a treaty. The treaty in this case does not, by its terms, purport to create a closed season between December 31st and March 10th. Its executory agreement to pass future legislation, covering this period, is not the supreme law of the land and cannot have the effect of giving validity to an unconstitutional act.

Our contention is that the treaty is void, and the Migratory Bird Treaty Act is also void, because they both undertake to control a subject matter within the exclusive jurisdiction of the states. But even if it should be held that the treaty, by its own force, operated to create a closed season between March 10th and September 1st, yet it cannot be successfully contended that the treaty can add anything whatsoever to the act of Congress insofar as the latter, or the regulations made by the Secretary of Agriculture, undertake to create a closed season between December 31st and March 10th. It is the act of Congress and not the treaty with which we have to deal.

The express language of Article II of the treaty is as follows:

> The closed season on migratory game birds shall be between March 10th and September 1st.

Assuming for the sake of argument that this provision of the treaty is the law of the land (although it is strenuously denied) and it does not by any means follow that the same can properly be said of the following provision:

> The season for hunting shall be further restricted to such period not exceeding three and one-half months

> as the High Contracting Parties may severally deem appropriate and define by law or regulation.

This is nothing more than an *executory agreement* of the two governments to further reduce the open season to such period, if at all, as may be deemed appropriate. It does not create a right or impose an obligation upon any *individual. It is not, therefore, the law of the land.* It is not operative, as a rule of conduct, *ex proprio vigore.* It is not self-executing or self-enforcing.

In *Whitney* v. *Robertson,* 124 U. S. 190, 194 (s. c. 31 L. Ed. 386, 388), the court said:

> A treaty is primarily a contract between two or more independent nations, and is so regarded by writers on public law. For the infraction of its provisions a remedy must be sought by the injured party through reclamations upon the other. When the stipulations are not self-executing they can only be enforced pursuant to legislation to carry them into effect, and such legislation is as much subject to modification and repeal by Congress as legislation upon any other subject. If the treaty contains stipulations which are self-executing, that is, require no legislation to make them operative, to that extent they have the force and effect of a legislative enactment. Congress may modify such provisions, so far as they bind the United States, or supersede them altogether. By the Constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other.

In *Turner* v. *American Baptist Missionary Union,* 5 McLean, 344, 347, Circuit Judge McLean in passing on an Indian Treaty in 1852, said:

> A treaty under the Federal Constitution is declared to be the supreme law of the land. This, unquestionably, applies to all treaties, *where the treaty-making power, without the aid of Congress, can carry it into effect. Until this power is exercised, as where the appropriation of money is required, the treaty is not perfect.* It is not operative, in the sense of the Constitution, as money cannot be appropriated by the treaty-making power. This results from the limitations of our government. The action of no department of the government can be regarded as a law until it shall have all the sanctions required by the Constitution to make it such. As well might it be contended that an ordinary act of Congress, without the signature of the President, was a law, as that a treaty which engages to pay a sum of money is in itself a law. And in such a case, the representatives of the people and the states exercise their own judgments in granting or withholding the money. They act upon their own responsibility, and not upon the responsibility of the treaty-making power. It cannot bind or control the legislative action in this respect, and every foreign government may be presumed to know, that so far as the treaty stipulates to pay money, the legislative sanction is required.

It is true that Congress has acted in compliance with this executory agreement, but it is not important that it acted because of the treaty rather than upon the same considerations that were influential in causing the passage of the similar act of 1913. The act of Congress, in either case, depends for its validity upon the power of Congress under the Constitution. The executory provisions of the treaty

79

add nothing to this power. In other words, the power of Congress, with or without the executory provisions of the treaty, is precisely the same.

The Constitution does not say that an agreement of the United States contained in a treaty, to pass laws in the future, as it may deem appropriate, shall be the supreme law of the land, nor does it say that an act of Congress passed in response to such an agreement shall be of greater force than any other act of Congress which depends for its validity upon the existence of proper constitutional power.

Respectfully submitted,

RICHARD J. HOPKINS, *Attorney General,*
and
SAMUEL W. MOORE, *amici curiae,* and in behalf of the State of Kansas.

STATE OF MISSOURI *v.* HOLLAND, UNITED STATES GAME WARDEN.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

No. 609. Argued March 2, 1920.—Decided April 19, 1920.

Protection of its quasi sovereign right to regulate the taking of game is a sufficient jurisdictional basis, apart from any pecuniary interest, for a bill by a State to enjoin enforcement of federal regulations over the subject alleged to be unconstitutional. P. 431.

The Treaty of August 16, 1916, 39 Stat. 1702, with Great Britain, providing for the protection, by close seasons and in other ways, of migratory birds in the United States and Canada, and binding each power to take and propose to their law-making bodies the necessary measures for carrying it out, is within the treaty-making power conferred by Art. II, § 2, of the Constitution; the Act of July 3, 1918, c. 128, 40 Stat. 755, which prohibits the killing, capturing or selling any of the migratory birds included in the terms of the treaty, except as permitted by regulations compatible with those terms to be made by the Secretary of Agriculture, is valid under Art. I, § 8, of the Constitution, as a necessary and proper means of effectuating the treaty; and the treaty and statute, by bringing such birds within the paramount protection and regulation of the Government do not infringe property rights or sovereign powers, respecting such birds, reserved to the States by the Tenth Amendment. P. 432.

With respect to rights reserved to the States, the treaty-making power is not limited to what may be done by an unaided act of Congress. P. 432.

258 Fed. Rep. 479, affirmed.

THE case is stated in the opinion.

Mr. J. G. L. Harvey and *Mr. John T. Gose*, Assistant Attorney General of the State of Missouri, with whom *Mr. Frank W. McAllister*, Attorney General of the State of Missouri, was on the brief, for appellant:

If the act of Congress now in question would have been unconstitutional when the Constitution and the first amendments were framed and ratified, it is unconstitutional now. The Constitution itself does not change. *South Carolina* v. *United States*, 199 U. S. 447, 448.

Under the ancient law, the feudal law, and the common law in England, the absolute control of wild game was a necessary incident of sovereignty. When, therefore, the United Colonies became "Free and Independent States" with full power to do all "acts and things which Independent States may of right do," the power to control the taking of wild game passed to the States. *Geer* v. *Connecticut*, 161 U. S. 519, 523–530; *Ward* v. *Race Horse*, 163 U. S. 504.

If it had even been suggested that, although Congress had no power to control the taking of wild game within the borders of any State, yet indirectly by means of a treaty with some foreign power it could acquire the power and by this means its long arm could reach into the States and take food from the tables of their people, who can for one moment believe that such a constitution would have been ratified? Wild game and the right of the people thereto have always been a "touchy" subject with all English speaking people. It was of sufficient importance to be a part of the *Magna Charta* and the "Charter of the Forests." See *Parker* v. *People*, 111 Illinois, 581, 647.

This power of the State over wild game within its borders, which "cannot be questioned" and "will not be gainsaid," is derived from the peculiar nature of such property and its common ownership by all the citizens of the State in their collective sovereign capacity. The State in its sovereign capacity is the representative of the people in their common ownership, and holds it in trust for the benefit of all its people. *Geer* v. *Connecticut, supra,* 529, 530; *McCready* v. *Virginia,* 94 U. S. 391; *Martin* v. *Waddell,* 16 Pet. 410; *United States* v. *Shauver,* 214 Fed. Rep. 154; *United States* v. *McCullagh,* 221 Fed. Rep. 288, 294; *Rupert* v. *United States,* 181 Fed. Rep. 87, 90; *Magner* v. *People,* 97 Illinois, 320, 333; *Gentile* v. *State,* 29 Indiana, 409, 417; *Ex parte Maier,* 103 California, 476, 483; *Chambers* v. *Church,* 14 R. I. 398, 400; *Manchester* v. *Massachusetts,* 139 U. S. 240; *Patsone* v. *Pennsylvania,* 232 U. S. 138; *Abby Dodge* v. *United States,* 223 U. S. 166; *Smith* v. *Maryland,* 18 How. 71; *Carey* v. *South Dakota,* 250 U. S. 118; *Silz* v. *Hesterberg,* 211 U. S. 31; *In re Deininger,* 108 Fed. Rep. 623; *Heim* v. *McCall,* 239 U. S. 175.

But the power of the State is not dependent upon the authority which the State derives from common ownership and the trust for the benefit of the people; it is a necessary incident of the power of police—an attribute of sovereignty. *State* v. *Heger,* 194 Missouri, 707.

If a source of food supply is not within the exclusive control of a State under its power of police, is there anything which is? If Congress by means of a treaty can tell the people of a State when and under what conditions they may take wild game which they own in their collective sovereign capacity, and in and over which, while within the borders of the State, neither Congress nor any foreign nation can have, either under national or international law (see Behring Sea Arbitration, 32 Amer. Law Reg. 901), any property rights or any power of control, then

the Tenth Amendment with its powers "reserved" to the States respectively or to the people, is a delusion, and they are States in name only, and our government a very different government from that presupposed and intended by the people who ratified the Constitution. *Passenger Cases*, 7 How. 474.

Upon the authority and principles of the cases above cited it has been held that the Act of Congress, approved March 4, 1913, was unconstitutional. The fact that the present act purports to give effect to a treaty cannot validate it. Every treaty must be presumed to be made subject to the rightful powers of the governments concerned, and neither the treaty-making power alone, nor the treaty-making power in conjunction with any or all other departments of the Government, can bind the Government to do that which the Constitution forbids. *Geofroy* v. *Riggs*, 133 U. S. 258, 267; *People* v. *Gerke*, 5 California, 381, 382 *et seq.; George* v. *Pierce*, 148 N. Y. S. 230, 237; *Compagnie* v. *Board*, 51 La. Ann. 645, 662; affd. 186 U. S. 380; *Cantini* v. *Tillman*, 54 Fed. Rep. 969; *Loan Association* v. *Topeka*, 20 Wall. 655, 662, 663; *Cherokee Tobacco Case*, 11 Wall. 616; *Siemessen* v. *Bofer*, 6 Cal. Rep. 250; *People* v. *Naglee*, 1 California, 246, 247; *Kansas* v. *Colorado*, 206 U. S. 80; *Murphy* v. *Ramsay*, 114 U. S. 15, 44; *Head Money Cases*, 112 U. S. 580; *Jones* v. *Meehan*, 175 U. S. 132; *Fong Yue Ting* v. *United States*, 149 U. S. 698; *Seneca Nation* v. *Christie*, 126 N. Y. 122; *Fort Leavenworth* v. *Lowe*, 114 U. S. 525; *Pierce* v. *State*, 13 N. H. 576; *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 326; *Mormon Church* v. *United States*, 136 U. S. 1; The Federalist, Nos. 33, 45; Works of Calhoun, vol. I, 203, 204, 249, 250, 252, 253; Tucker, Const., vol. II, 725, 726; Butler, Treaty Making Power, vol. I, 64; vol. II, 350, 352; Story, Const., § 1508; Duer, Lectures on Constitutional Jurisprudence of the United States, 2d ed., 228; Cooley, Const. Law, 117; Van Holst, Const. Law,

202; Thayer, Cases on Const. Law, vol. I, 373; Senator Rayner, 59th Cong., 41 Cong. Rec., pt. 1, 299; Cocke's Constitutional History, 235; Jefferson, Manual of Parliamentary Practice, 110, note 3; Elliot's Debates, vol. III, 504, 507; Cooley, Const. Lim., 7th ed., 11; Hamilton's Works, vol. IV, 324.

In the consideration of the questions involving the powers of the federal and state governments there exists the temptation to lodge all sovereign or governmental power in either the United States or the States. This disposition is evidenced by the erroneous statement that there exist in this country dual sovereignties. Cf. 8 Ops. Atty. Gen. 411–415. The power reserved to the people is overlooked. *Kansas* v. *Colorado*, 206 U. S. 90. The Federal Government is a government not only of enumerated powers, but it is also a government to which certain powers are denied. Powers denied are not to be implied: they are to be obtained, if at all, from, and in the manner provided by, those who originally granted the enumerated powers, but who at the same time denied other powers—the people. *Barron* v. *Baltimore*, 7 Pet. 243, 247; *Kansas* v. *Colorado*, *supra*; *United States* v. *Shauver*, 214 Fed. Rep. 154, 156; *Holden* v. *Joy*, 17 Wall. 243; *United States* v. *Rhodes*, 1 Abb. U. S. Rep. 43; Fed. Cases, 16151; *Fairbank* v. *United States*, 181 U. S. 283, 288; Tucker, Const., vol. I, 371–373.

Among the powers so denied are those over purely internal affairs which "concern the lives, liberties and properties of the people and the internal order, improvement and prosperity of the State," including, as held without exception, the control over wild game. When the power of the States over their purely internal affairs is destroyed, the system of government devised by the Constitution is destroyed.

If these reserved powers could be taken over through the device of treaty making, the President and Senate could

control the laws of a State relating to inspection, quarantine, health and internal trade; prescribe the times and modes of elections; force the introduction and sale of opium, intoxicating liquors or other substances, however injurious to the health and well-being of a State; cede to a foreign power a State or any part of its territory, and destroy the securities of liberty and property as effectually as the most despotic government ever formed.

But this is not all. If the treaty-making power is not within the constitutional limitations relating to the powers reserved to the States, it is not limited by any restriction of the Constitution. The Federal Government itself, as well as the several States, would be at the mercy of the President and the Senate. They could regulate foreign commerce in spite of the fact that Congress is expressly authorized to control it. They could provide for duty rates upon articles imported from foreign nations, or admit them free of duty, although Congress has express authority to lay and collect taxes and duties. They could appropriate directly from the public treasury the public moneys in the face of the express power of Congress to originate all such appropriations. They could dispose of any part of the territory of the United States, or any of their property, without the consent of Congress, which alone has power to dispose of and make rules and regulations for the property of the United States. In short, the Federal Government would be a government of men, and not of laws. The question is not whether or not they will do these things but whether or not, under our form of government, they have the power.

If a treaty be "the supreme law of the land," it has become so by construction, for the Constitution as ratified by the people made the supreme law of the land to consist of three things: (1) The Constitution; (2) the laws of the United States which shall be made in pursuance thereof; (3) all treaties made or which shall be made

under the authority of the United States. The powers reserved to the States respectively or to the people are, under this Constitution, as sacred as the power to make treaties. Are they not even more so since they are the object of specific reservation and necessarily limit or restrict the general grant of power made to the treaty-making department of the government? Hamilton's Works, vol. IV, 342; Cooley, The Forum, June, 1893, p. 397; Von Holst, Const. Law of United States, 202; Duer, Lectures on Constitutional Jurisprudence of the United States, 2d ed., 228; Tucker, Lim. Treaty-Making Power, 128, 129, 135–136, 139, 93–94, 86–87; Judge Shackleford Miller, quoted in Tucker, Lim. Treaty-Making Power, 21, 22.

The United States existed under the Articles of Confederation and the purpose was to include treaties made under that authority as well as those which should be made under the Constitution. The "authority of the United States" under the Articles of Confederation and under the Constitution was an authority derived from enumerated powers accompanied by specific reservations, and under both the Articles of Confederation and the Constitution certain rights of the States respectively and the people were jealously guarded by express exceptions. There was and could be no "authority of the United States" outside of and beyond that given by the Articles of Confederation and the Constitution.

That a treaty stands upon an equal footing with a law of the United States is settled. *Cherokee Tobacco Case*, 11 Wall. 616; *Ward* v. *Race Horse*, 163 U. S. 504.

The term "treaty" must undoubtedly be given a broad meaning, and generally speaking, it may be said that by this clause there is conferred the power to make treaties on those matters ordinarily the subject of treaties between sovereign powers. But, in the very nature of things, there must be a limit, else that power would de-

stroy many of the other provisions of the Constitution. Such meaning must be given each part of the Constitution as will not interfere with the meaning of the other parts, in order that effect may be given to the whole.

The cases usually cited by those who advocate the supremacy of a treaty do not in any instance hold that the reserved powers of a State or a trust which the State holds for the benefit of all its people are subject to and may be annulled by a treaty having for its subject the regulation of a matter which is reserved to the States respectively or to the people by the Tenth Amendment. *Ware* v. *Hylton*, 3 Dall. 199; *Chirac* v. *Chirac*, 2 Wheat. 259; *Geofroy* v. *Riggs*, 133 U. S. 266 (cf. *Fox* v. *United States*, 94 U. S. 320); *Orr* v. *Hodgson*, 4 Wheat. 453; *Fairfax* v. *Hunter*, 7 Cranch, 603; *People* v. *Gerke*, 5 California, 381, 384 (cf. Tucker, Address before Georgia Bar Association, June 2, 1917, p. 23; Lim. on Treaty-Making Power, c. 6, pp. 143 *et seq.*); *Hauenstein* v. *Lynham*, 100 U. S. 483; 22 Ops. Atty. Gen. 215.

In the making of the Constitution a negative, in any form, upon laws passed by the States in the exercise of their reserved powers was defeated, though persistently urged, in some form, by some of the ablest men in the Constitutional Convention. It was universally admitted that under the Constitution as it stood the Federal Government had no such power, and by the first ten amendments the people undertook to forestall any attempt on the part of the Federal Government to obtain such power by construction. Works of Calhoun, 246, 247, 249, 250.

Treaties are not to be given a sanctity which shields them from inspection and rejection, if, by their terms they do that which the Constitution forbids, and destroy essential rights of the States or the people. *Downes* v. *Bidwell*, 182 U. S. 244, 344; *Compagnie* v. *Board*, 186 U. S. 380, 395; *Heim* v. *McCall*, 239 U. S. 175, 194.

The High Contracting Powers must be held to have

known that the power of the Federal Government did not extend to the taking over of a trust exercised by the State in relation of the common property of its citizens, or the enactment of mere police regulations within the limits of a State; and the language of Article VIII seems to indicate that they both had acted upon this knowledge. Such construction leaves both the treaty and the laws of Missouri intact. It results in holding unconstitutional only an act of Congress which was not necessarily required by the treaty, and which, under the Constitution, Congress had no power to pass.

The Solicitor General and *Mr. Assistant Attorney General Frierson* for appellee:

A migratory bird law of this kind is sustained, apart from treaty, by the power to dispose of and make all needful rules and regulations respecting the property belonging to the United States (Art. IV, § 3), and by the power to regulate commerce between the States.

The Constitution expressly grants to Congress the power to enact such laws as may be necessary to give effect to treaties. Art. I, § 8; *Baldwin* v. *Franks*, 120 U. S. 678; *United States* v. *Jin Fuey Moy*, 241 U. S. 394; *Chinese Exclusion Case*, 130 U. S. 581.

Whenever a treaty operates of itself, it is to be regarded in the courts as equivalent to an act of Congress. But if it is only promissory, it is then clearly within the province of Congress to enact legislation necessary to put it into effect. *Foster* v. *Neilson*, 2 Pet. 253, 314; *United States* v. *43 Gallons of Whiskey*, 93 U. S. 188, 196.

The power of Congress to legislate to make treaties effective is not limited to the subjects with respect to which it is empowered to legislate in purely domestic affairs.

There are many national questions affecting alone this Government or the people of the United States with which

it deals. With respect to this class the line of demarcation between the powers of the state governments and those of the Federal Government is clearly marked by the Constitution. But when we come to deal with national questions affecting the interests of other countries as well as our own, we confront a different situation. At home, we are citizens of dual sovereignties, each supreme within its own sphere. But, in our intercourse with foreign nations, we are one people and one nation. In our relations to foreign countries and their subjects or citizens, our Federal Government is one Government and is invested with the powers which belong to independent nations and which the several States would possess, if separate nations, and the exercise of these powers can be invoked for the maintenance of independence and security throughout the entire country. *Cohens* v. *Virginia*, 6 Wheat. 264, 413; *Knox* v. *Lee*, 12 Wall. 457, 555; *Chinese Exclusion Case*, 130 U. S. 581, 604.

In exercising the treaty-making power, the Federal Government acts for the entire American people, whether we regard them as citizens of the United States or as citizens of the several States, and likewise for every State. As said by this court in *Hauenstein* v. *Lynham*, 100 U. S. 483, 490: "If the National Government has not the power to do what is done by such treaties, it cannot be done at all, for the States are expressly forbidden to 'enter into any treaty, alliance, or confederation.'"

Since the power was expressly granted to Congress to enact legislation necessary and proper to put into execution a treaty, the validity of such legislation cannot depend upon whether its subject-matter is included within the general legislative powers of Congress. Rather, it depends upon whether the treaty which is being enforced is within the treaty-making power of the United States. *In re Ross*, 140 U. S. 453, 463.

By the Constitution the complete and unrestricted

treaty-making power possessed by the States is expressly granted to the United States to be exercised by the President and Senate. The exercise of such power is expressly prohibited to the States. Therefore, except as restrained by prohibitions contained in other clauses of the Constitution, the entire treaty-making power of the States was vested in the United States when that instrument was adopted in 1788.

Amendment X (thereafter adopted) reserves to the States or the people all powers not granted to the United States nor prohibited to the States. As the treaty powers had been both granted to the United States and prohibited to the States, they were expressly excepted from the reservations of the Tenth Amendment, and it is wholly irrelevant. A treaty made by the treaty-making power does not derogate from the power of any State. It is an exercise of the treaty-making power of such State in conjunction with the like powers of all of the States by their common government—the agency they appointed in adopting the Constitution.

It is undoubtedly true that, generally, matters of a purely local nature are reserved for the legislative power of the States. But just what these reserved powers are depends upon the extent to which powers, either expressly or by necessary implication, are conferred upon the Federal Government. The police powers are those most generally regarded as having been reserved to the States. But, if the full exertion of any power conferred upon the Federal Government requires the exercise of police powers within the States, such powers may be exercised to the extent necessary, although they may involve an interference with what would otherwise lie exclusively within the province of the State. *United States* v. *Thompson*, 258 Fed. Rep. 257, 264. That the police or other powers of the States cannot be interposed as an obstacle to the exertion of these federal powers to make and enforce

treaties has been too often decided to now admit of doubt. *Wildenhus's Case*, 120 U. S. 1, 17; *Ware* v. *Hylton*, 3 Dall. 199; *Chirac* v. *Chirac*, 2 Wheat. 259, 276; *Geofroy* v. *Riggs*, 133 U. S. 258, 266; *Hopkirk* v. *Bell*, 3 Cranch, 454; *United States* v. *43 Gallons of Whiskey*, 93 U. S. 188; *United States* v. *Winans*, 198 U. S. 371.

It is inconceivable that, since the States were to be denied the treaty-making power, the framers of the Constitution intended that the treaty-making power conferred upon the new Government should be less than that possessed by any other independent government and less than that possessed by the State conferring it. The very general language used in conferring the power negatives such an intention. What was conferred was obviously that power to negotiate treaties which is essential if there is to be intercourse between nations.

Again, those representing the States in the Constitutional Convention understood too well the necessity for the exercise of such a power to have been willing to deprive the States of the ample power that they had unless, at least, as full power was to be vested in some other agency.

It must be remembered that every power which was conferred upon the Federal Government was taken from those powers which the State had the right to exercise, and it would seem impossible to construe the two provisions of the Constitution, above referred to, as accomplishing anything short of the transfer of all the treaty-making power which the several States had to the new Federal Government. *Baldwin* v. *Franks*, 120 U. S. 678, 682, 683.

Before the adoption of the Constitution it cannot be doubted that each State could not only enact such laws as it deemed necessary for the protection of game within its borders, but could, likewise, enter into a treaty with any other State or foreign country for the protection of

migratory game which remained within its borders only a portion of the year. After the adoption of the Constitution, however, as said in *Geer* v. *Connecticut*, 161 U. S. 519, 528, this power remained in the States only "in so far as its exercise may be not incompatible with, or restrained by, the rights conveyed to the Federal Government by the Constitution." But if the protection of migratory game is a proper subject-matter for treaties between independent nations, the power to secure this protection was expressly conferred upon the Federal Government as a part of the treaty-making power.

The peculiar nature of its property in migratory game, which is in one country during a part of the year and in another during the remainder of the year, makes it impossible for the laws of one State or one country to give ample protection. This can be accomplished only by concert of action on the part of two or more States or countries. This, in the very nature of things, cannot be secured except through the medium of treaties.

The treaty-making power applies to all matters which may properly be the subject of negotiations between the two governments. Calhoun, 4 Elliot's Debates, 464; Story, Const., 5th ed., § 1508; *Ware* v. *Hylton*, 3 Dall. 199, 235; *Geofroy* v. *Riggs*, 133 U. S. 258, 266; *In re Ross*, 140 U. S. 453, 463.

The protection of migratory game is a proper subject of negotiations and treaties between the governments of the countries interested in such game. Van Valkenburgh, J., in the court below, 258 Fed. Rep. 479, 484; *United States* v. *Rockefeller*, 260 Fed. Rep. 346–348.

It may be that, while migratory birds are within a State, that State, as trustee for its people, has the same title to them that it has to birds which remain permanently within its borders. But, when the birds return to Canada, that government has exactly the same title that the State has when they are in the United States. More-

over, while the birds are in Canada, the State to which they customarily migrate is still interested in them, because, when they return, its title again attaches. Manifestly, then, the States of the United States are as much interested in the preservation of these birds while in Canada as while in the United States. But for the protection of these migratory birds while they are in a foreign country, each State is powerless. While in the one case, therefore, it resorts to its own legislative power, in the other it must have resort to an exercise of power by the agent which it has agreed shall act for it in negotiating and making treaties with foreign governments.

Mr. Richard J. Hopkins, Attorney General of the State of Kansas, and *Mr. Samuel W. Moore*, by leave of court, filed a brief as *amici curiæ*, in behalf of the State of Kansas:

Every State possesses the absolute right to deal as it may see fit with property held by it either as proprietor or in its sovereign capacity as a representative of the people, and this right is paramount to the federal legislative or treaty-making power.

The constitutional limitation prohibiting a State without the consent of Congress from entering into any agreement or compact with any State or with a foreign power prohibits "the formation of any combination tending to the increase of political power in the States which may encroach upon or interfere with the just supremacy of the United States." It has no application to agreements or compacts which a State may make in the control and regulation of its own property or property rights.

Congress' lack of legislative power to divest a State of its property right and control over the wild game within its borders cannot be supplied by making a treaty with Great Britain.

The treaty-making power of the National Government

is so limited by other provisions of the Constitution, including the Tenth Amendment, that it cannot divest a State of its police power or of its ownership or control of its wild game.

The courts have never upheld a treaty whose subject-matter extended beyond the constitutional domain of congressional legislation.

The treaty in this case does not, by its terms, purport to create a closed season between December 31st and March 10th. Its executory agreement to pass future legislation covering this period is not the supreme law of the land and cannot have the effect of giving validity to an unconstitutional act.

Mr. Louis Marshall, by leave of court, filed a brief as *amicus curiæ*, in behalf of the Association for the Protection of the Adirondacks:

Irrespective of whether migratory birds may be considered property belonging to the United States and regardless of the sanction of the treaty-making power, the Migratory Bird Treaty Act, as was its precursor the Act of March 4, 1913, c. 145, 37 Stat. 847, is valid as an enactment of "needful rules and regulations" respecting the national forests and other parts of the public domain, which constitute "property belonging to the United States," within the meaning of paragraph 2, § 3 of Article IV of the Constitution.

The fact that the States are trustees of animals *ferœ naturæ* within their boundaries, does not prevent the United States from preserving such animals for the purpose of protecting its property.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill in equity brought by the State of Missouri to prevent a game warden of the United States from attempting to enforce the Migratory Bird Treaty Act of

July 3, 1918, c. 128, 40 Stat. 755, and the regulations made by the Secretary of Agriculture in pursuance of the same. The ground of the bill is that the statute is an unconstitutional interference with the rights reserved to the States by the Tenth Amendment, and that the acts of the defendant done and threatened under that authority invade the sovereign right of the State and contravene its will manifested in statutes. The State also alleges a pecuniary interest, as owner of the wild birds within its borders and otherwise, admitted by the Government to be sufficient, but it is enough that the bill is a reasonable and proper means to assert the alleged quasi sovereign rights of a State. *Kansas* v. *Colorado*, 185 U. S. 125, 142. *Georgia* v. *Tennessee Copper Co.*, 206 U. S. 230, 237. *Marshall Dental Manufacturing Co.* v. *Iowa*, 226 U. S. 460, 462. A motion to dismiss was sustained by the District Court on the ground that the act of Congress is constitutional. 258 Fed. Rep. 479. Acc. *United States* v. *Thompson*, 258 Fed. Rep. 257; *United States* v. *Rockefeller*, 260 Fed. Rep. 346. The State appeals.

On December 8, 1916, a treaty between the United States and Great Britain was proclaimed by the President. It recited that many species of birds in their annual migrations traversed certain parts of the United States and of Canada, that they were of great value as a source of food and in destroying insects injurious to vegetation, but were in danger of extermination through lack of adequate protection. It therefore provided for specified close seasons and protection in other forms, and agreed that the two powers would take or propose to their law-making bodies the necessary measures for carrying the treaty out. 39 Stat. 1702. The above mentioned Act of July 3, 1918, entitled an act to give effect to the convention, prohibited the killing, capturing or selling any of the migratory birds included in the terms of the treaty except as permitted by regulations compatible with those terms, to be made by

the Secretary of Agriculture. Regulations were proclaimed on July 31, and October 25, 1918. 40 Stat. 1812; 1863. It is unnecessary to go into any details, because, as we have said, the question raised is the general one whether the treaty and statute are void as an interference with the rights reserved to the States.

To answer this question it is not enough to refer to the Tenth Amendment, reserving the powers not delegated to the United States, because by Article II, § 2, the power to make treaties is delegated expressly, and by Article VI treaties made under the authority of the United States, along with the Constitution and laws of the United States made in pursuance thereof, are declared the supreme law of the land. If the treaty is valid there can be no dispute about the validity of the statute under Article I, § 8, as a necessary and proper means to execute the powers of the Government. The language of the Constitution as to the supremacy of treaties being general, the question before us is narrowed to an inquiry into the ground upon which the present supposed exception is placed.

It is said that a treaty cannot be valid if it infringes the Constitution, that there are limits, therefore, to the treaty-making power, and that one such limit is that what an act of Congress could not do unaided, in derogation of the powers reserved to the States, a treaty cannot do. An earlier act of Congress that attempted by itself and not in pursuance of a treaty to regulate the killing of migratory birds within the States had been held bad in the District Court. *United States* v. *Shauver*, 214 Fed. Rep. 154. *United States* v. *McCullagh*, 221 Fed. Rep. 288. Those decisions were supported by arguments that migratory birds were owned by the States in their sovereign capacity for the benefit of their people, and that under cases like *Geer* v. *Connecticut*, 161 U. S. 519, this control was one that Congress had no power to displace. The same argument is supposed to apply now with equal force.

Whether the two cases cited were decided rightly or not they cannot be accepted as a test of the treaty power. Acts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States. It is open to question whether the authority of the United States means more than the formal acts prescribed to make the convention. We do not mean to imply that there are no qualifications to the treaty-making power; but they must be ascertained in a different way. It is obvious that there may be matters of the sharpest exigency for the national well being that an act of Congress could not deal with but that a treaty followed by such an act could, and it is not lightly to be assumed that, in matters requiring national action, "a power which must belong to and somewhere reside in every civilized government" is not to be found. *Andrews* v. *Andrews*, 188 U. S. 14, 33. What was said in that case with regard to the powers of the States applies with equal force to the powers of the nation in cases where the States individually are incompetent to act. We are not yet discussing the particular case before us but only are considering the validity of the test proposed. With regard to that we may add that when we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago. The treaty in question does not contravene any prohibitory words to be found in the Constitution. The only question is whether

it is forbidden by some invisible radiation from the general terms of the Tenth Amendment. We must consider what this country has become in deciding what that Amendment has reserved.

The State as we have intimated founds its claim of exclusive authority upon an assertion of title to migratory birds, an assertion that is embodied in statute. No doubt it is true that as between a State and its inhabitants the State may regulate the killing and sale of such birds, but it does not follow that its authority is exclusive of paramount powers. To put the claim of the State upon title is to lean upon a slender reed. Wild birds are not in the possession of anyone; and possession is the beginning of ownership. The whole foundation of the State's rights is the presence within their jurisdiction of birds that yesterday had not arrived, tomorrow may be in another State and in a week a thousand miles away. If we are to be accurate we cannot put the case of the State upon higher ground than that the treaty deals with creatures that for the moment are within the state borders, that it must be carried out by officers of the United States within the same territory, and that but for the treaty the State would be free to regulate this subject itself.

As most of the laws of the United States are carried out within the States and as many of them deal with matters which in the silence of such laws the State might regulate, such general grounds are not enough to support Missouri's claim. Valid treaties of course "are as binding within the territorial limits of the States as they are elsewhere throughout the dominion of the United States." *Baldwin* v. *Franks*, 120 U. S. 678, 683. No doubt the great body of private relations usually fall within the control of the State, but a treaty may override its power. We do not have to invoke the later developments of constitutional law for this proposition; it was recognized as early as *Hopkirk* v. *Bell*, 3 Cranch, 454, with regard to statutes

of limitation, and even earlier, as to confiscation, in *Ware* v. *Hylton*, 3 Dall. 199. It was assumed by Chief Justice Marshall with regard to the escheat of land to the State in *Chirac* v. *Chirac*, 2 Wheat. 259, 275. *Hauenstein* v. *Lynham*, 100 U. S. 483. *Geofroy* v. *Riggs*, 133 U. S. 258. *Blythe* v. *Hinckley*, 180 U. S. 333, 340. So as to a limited jurisdiction of foreign consuls within a State. *Wildenhus's Case*, 120 U. S. 1. See *Ross* v. *McIntyre*, 140 U. S. 453. Further illustration seems unnecessary, and it only remains to consider the application of established rules to the present case.

Here a national interest of very nearly the first magnitude is involved. It can be protected only by national action in concert with that of another power. The subject-matter is only transitorily within the State and has no permanent habitat therein. But for the treaty and the statute there soon might be no birds for any powers to deal with. We see nothing in the Constitution that compels the Government to sit by while a food supply is cut off and the protectors of our forests and our crops are destroyed. It is not sufficient to rely upon the States. The reliance is vain, and were it otherwise, the question is whether the United States is forbidden to act. We are of opinion that the treaty and statute must be upheld. *Carey* v. *South Dakota*, 250 U. S. 118.

Decree affirmed.

MR. JUSTICE VAN DEVANTER and MR. JUSTICE PITNEY dissent.